

The Federal Court of Australia's Power to Terminate Properly Instituted Class Actions

Vince Morabito

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>



Part of the [Courts Commons](#)

Article

Citation Information

Morabito, Vince. "The Federal Court of Australia's Power to Terminate Properly Instituted Class Actions." *Osgoode Hall Law Journal* 42.3 (2004) : 473-513.

<http://digitalcommons.osgoode.yorku.ca/ohlj/vol42/iss3/3>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

The Federal Court of Australia's Power to Terminate Properly Instituted Class Actions

Abstract

The regime governing class actions in the Federal Court of Australia is unique, by international standards, as it does not require the formal authorisation of the Court before a proceeding may be brought and conducted as a class action. A class action may be commenced in the Federal Court as long as certain prerequisites are satisfied. Another unique aspect of this regime is that wide powers have been conferred upon the Court to terminate, as class actions, proceedings that have complied with the requirements for commencing a class action. It is the aim of this article to explore the conceptual and practical issues raised by the availability and exercise of these powers to discontinue properly commenced class actions. As part of this evaluation, the Canadian and United States class action regimes are extensively canvassed.

Keywords

Class actions (Civil procedure); Australia. Federal Court; Canada; United States

THE FEDERAL COURT OF AUSTRALIA'S POWER TO TERMINATE PROPERLY INSTITUTED CLASS ACTIONS[©]

BY VINCE MORABITO*

The regime governing class actions in the Federal Court of Australia is unique, by international standards, as it does not require the formal authorisation of the Court before a proceeding may be brought and conducted as a class action. A class action may be commenced in the Federal Court as long as certain prerequisites are satisfied. Another unique aspect of this regime is that wide powers have been conferred upon the Court to terminate, as class actions, proceedings that have complied with the requirements for commencing a class action. It is the aim of this article to explore the conceptual and practical issues raised by the availability and exercise of these powers to discontinue properly commenced class actions. As part of this evaluation, the Canadian and United States class action regimes are extensively canvassed.

Selon les normes internationales, le régime régissant les actions de groupe à la Cour fédérale d'Australie est unique en son genre en ce sens qu'il permet d'introduire et d'intenter une action en justice en qualité d'action de groupe sans autorisation officielle de cette Cour. Il est permis d'introduire une action de groupe auprès de la Cour fédérale sous réserve de remplir certaines conditions préalables. Un autre aspect particulier de ce régime est qu'étant donné leur qualité d'action de groupe, la Cour possède des pouvoirs étendus pour mettre fin à des procédures qui respectent les conditions exigées. Cet article a pour but d'examiner les questions conceptuelles et pratiques qui appuient cette validité, et d'utiliser ces pouvoirs pour mettre fin à des actions de groupe introduites selon les règles. Dans le cadre de la présente évaluation, l'article examine en profondeur les régimes des actions de groupe du Canada et des États-Unis.

I.	INTRODUCTION	474
II.	THE PART IVA REGIME	478
	A. <i>The Recommendations of the Australian Law Reform Commission</i>	478
	B. <i>The Policy Goals of PART IVA</i>	480
	C. <i>Section 33C's Commencement Prerequisites</i>	481
III.	JUDICIAL DISCONTINUANCE OF PROPERLY COMMENCED PART IVA PROCEEDINGS	482
	A. <i>Overview</i>	482
	B. <i>Strategies Implemented by PART IVA Defendants</i>	484
	C. <i>The North American Regimes</i>	485
	D. <i>Section 33L</i>	487
	E. <i>Section 33M</i>	490
IV.	SECTION 33N	491
	A. <i>Overview</i>	491
	B. <i>Paragraph (a)</i>	493
	C. <i>Paragraph (b)</i>	494
	D. <i>Paragraph (c)</i>	498
	1. <i>Practical Focus of Class Action Devices</i>	502

[©] 2004, Vince Morabito.

* BEc, LL.B. (Hons), LL.M., Ph.D. (Mon); Associate Professor, Department of Business Law and Taxation, Monash University (Victoria, Australia).

2. The Judicial Economy Goal of Class Actions	504
3. The General Scheme of PART IVA	506
E. <i>Paragraph (d)</i>	508
V. CONCLUSION	511

I. INTRODUCTION

The regime created pursuant to Rule 23 of the *United States Federal Rules of Civil Procedure*,¹ which has been regulating class actions in American Federal Courts since 1938, constitutes the world's first comprehensive class action regime.² This rule, which was completely redrafted in 1966 and amended in 2003, provides that "when a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action."³

Certification regimes have been recommended by many law reform bodies⁴ and similar entities in several Commonwealth countries.⁵ The eight

¹ U.S. *Federal Rules of Civil Procedure*, Rule 23.

² See Alberta Law Reform Institute, *Class Actions* (Final Report no. 85; 2000), at 30 [ALRI Report]; and Law Reform Commission of Ireland, *Consultation Paper on Multi-Party Litigation (Class Actions)* (Consultation Paper no. 25; 2003) at 29 [LRCI Report].

³ *Supra* note 1, Rule 23(c)(1)(A). A certification regime was also employed in the *Uniform Class Actions Act*, drafted in the United States in 1976 by the National Conference of Commissioners on Uniform State Laws: see I. Scher, "Opening State Courts to Class Actions: The Uniform Class Actions Act" (1976) 32 *Bus. Law.* 75 at 86-87.

⁴ As indicated in 1995 by Ruth Rogers of the Ministry of the Attorney-General of British Columbia, "[t]he first issue in any proposal for class action legislation is whether there is a need for a preliminary step in the process called 'certification' or 'authorization'": Ruth Rogers, "A Uniform Class Actions Statute" (Appendix O to the Proceedings of the 1995 Meeting of the Uniform Law Conference of Canada) at 4-5, online: <<http://www.law.ualberta.ca/alri/ulc/95pro/e95o.htm>>.

⁵ See Ontario Law Reform Commission, *Report on Class Actions* (Report no. 48; 1982) at 281-83, 307 [OLRC Report]; *Report of the Attorney-General's Advisory Committee on Class Action Reform* (Toronto; 1990) at 30-32 [Ontario Committee Report]; *Uniform Class Actions Act*, s. 2. This draft Act was adopted by the Uniform Law Conference of Canada in 1996, see the *Proceedings of the Seventy-Eighth Annual Meeting* (Ottawa; 1996); Rogers, *supra* note 4 at 6; Lord Woolf, *Access to Justice – Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) at 229-30; Lord Chancellor's Department, *Representative Claims: Proposed New Procedures* (Consultation Paper; 2001) at paras. 19-20; LRCI Report, *supra* note 2 at 76; Manitoba Law Reform Commission, *Class Proceedings* (Report no. 100; 1999) at 42-43 [MLRC Report]; ALRI Report, *supra* note 2 at 86 (Recommendation 5(1)); Rules Committee of the Federal Court of Canada, *Class Proceedings in the Federal Court of Canada* (Discussion Paper; 2000) at 38-39 [FC Committee Report]; Scottish Law Commission, *Multi-Party Actions* (Scot. Law Com. no. 154; 1996) at 26; and South African Law Commission, *The Recognition of A Class Action in South African Law* (Project 88; Working Paper 57; 1995) at 59 [SALC]. See also, W le R De Vos, "Reflections on the Introduction of a Class Action in South Africa" (1996) 116 *J. S. Afr. L.* 639 at 645; Law Reform Committee of South Australia, *Thirty-Sixth Report of the Law Reform Committee of South Australia to the Attorney-General—Relating to Class Actions* (Report no 36;

Canadian jurisdictions that have, over the last twenty-four years or so, put in place detailed frameworks to authorize and govern the prosecution of class actions have all made the certification procedure a central aspect of their regimes.⁶ Similarly, when new rules were introduced in 1987 to regulate class actions in the Supreme Court of South Australia, a certification procedure was implemented.⁷

But when a new PART IVA was added to the *Federal Court of Australia Act 1976* (Cth.)⁸ in 1992, enabling class actions to be brought in the Federal Court of Australia, it did not include a requirement that those proposing to assume the role of representative plaintiffs seek the authorization of the Court before being able to avail themselves of the PART IVA regime. The Australian Parliament's decision not to implement a certification regime was based on a recommendation found in a report on class action reform prepared by the Australian Law Reform Commission (ALRC) in 1988.⁹

Although it does not require representative plaintiffs to seek the leave of the Court before being allowed to avail themselves of the PART IVA regime, PART IVA nevertheless adopts an approach to the commencement of class actions that is similar to that adhered to by class action regimes that employ certification procedures. In fact, as is the case with certification regimes, PART IVA sets out a list of prerequisites which must exist before a proceeding may be brought pursuant to the PART IVA regime. Where a proceeding is brought on behalf of a class in the Federal Court and some

1977) at 7 [LRCSA Report]. Certification regimes have also been recommended in jurisdictions outside the Commonwealth. See e.g. Norwegian Civil Procedure Commission, *Proposed Rules Concerning Group Action* (Provisional Draft issued by the Norwegian Civil Procedure Commission; 2000) at 1.

⁶ See *Code of Civil Procedure of Quebec*, R.S.Q. c. C-25, Book IX, art. 1002 [*Quebec Code*]; *Class Proceedings Act*, S.O. 1992, c. 6, s. 2 [*Ontario Act*]; *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 2 [*B.C. Act*]; *Class Actions Act*, SS 2001, c. C-12.01, s. 4 [*Saskatchewan Act*]; *Class Actions Act*, S.N.L. 2001, c. C-18.1, s. 3 [*Newfoundland Act*]; *The Class Proceedings Act*, S.M. 2002, c. 14, s. 2 [*Manitoba Act*]; *Federal Court Rules 1998* (SOR/98 - 106, Rule 299-12 [*Federal Court Rules*]; and *Class Proceedings Act*, S.A. 2003, c. C-16.5, s. 2 [*Alberta Act*]. A preference for the certification procedure was also recently expressed by the Supreme Court of Canada: *Western Canadian Shopping Centres Inc v. Bennett Jones Verchere* (2001), 201 D.L.R. (4th) 385 at 399, McLachlin C.J.C. [*Western Canadian*].

⁷ The South Australian rules provide that "the representative parties must within twenty-eight days after the day upon which the defendant filed a notice of address for service ... apply to the Court for: (a) an order authorising the action to be maintained as a representative action; (b) directions as to the conduct of the action": *Supreme Court Rules 1987* (S.A.), Rule 34.02.

⁸ *Federal Court of Australia Act 1976* (Cth.) [FCAA].

⁹ The Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report no. 46; 1988) at 63-64 [ALRC Report]. This rejection of a certification requirement has recently been criticised by a leading U.S. commentator: Edward H. Cooper, "Class Action Advice in the Form of Questions" (2001) 11 *Duke J. of Comp. & Int'l L.* 215 at 231-32.

or all of the commencement prerequisites have not been met, the parties opposing the class may seek the intervention of the Court and have the proceedings terminated as PART IVA proceedings. Consequently, the lack of a certification procedure has not resulted in a regime where defendants and the courts are unable to prevent plaintiffs from bringing PART IVA proceedings that may be unfair for defendants or class members.

On the contrary, it will be shown that the Federal Court has a greater power to determine which proceedings should be conducted as class actions than courts that have the power to withhold certification orders. This state of affairs stems from differences in the power to discontinue properly commenced class actions. In the United States and Canada, once proceedings are certified as class actions, the power of the court to decertify the proceedings, that is, to stop the proceedings from progressing as class proceedings, is limited to a judicial determination that the certification prerequisites no longer exist or never existed. In other words, certification regimes do not empower courts to terminate properly constituted (or certified) class actions pursuant to criteria or factors that are different from those that are considered during the initial certification hearing. In some Canadian jurisdictions, this power to decertify may not be exercised by the Court on its own motion.

The scenario under Australia's PARTIVA is fundamentally different. It has already been pointed out that the Federal Court can bring PART IVA proceedings to an end where it accepts the arguments of the defendants¹⁰ that the threshold criteria have not been satisfied. PART IVA also vests the Federal Court with broad powers to terminate proceedings that have adhered to the commencement prerequisites. In fact, these termination powers, unlike the power of U.S. and Canadian courts to decertify, are not dependent on a finding that the commencement prerequisites no longer exist or never existed. Instead, these powers are based on additional criteria, some of which confer on the court a very broad power, including the ability to terminate a proceeding because the court is of the view that it is "inappropriate" that the proceeding progress as a class proceeding. The most significant of these powers, found in section 33N, may be exercised by the court on its own motion.

The Court's wide discretion to terminate proceedings as class proceedings raises a number of significant questions. What benefits are expected to be secured through the exercise of these wide termination powers? Are these powers in accordance with the philosophy underpinning

¹⁰ In the Federal Court of Australia, plaintiffs are referred to as applicants whilst defendants are known as respondents. But in this article the conventional terms of plaintiffs and defendants will be employed.

PART IVA and class action regimes in general? What impact has the existence of these powers had on the way in which PART IVA proceedings are conducted? What effect have these powers had on the ability of groups of claimants with similar legal grievances to access the Federal Court through the PART IVA regime? Does the absence of a certification model justify a power to discontinue that is not linked to the commencement prerequisites?

In light of the importance of these conceptual and practical issues raised by the Federal Court's ability to discontinue proceedings that have been properly constituted as class proceedings, it is surprising that this aspect of the PART IVA regime has been largely ignored by legal commentators.¹¹ This article addresses this lacuna in the legal literature on class actions.¹²

The picture that will emerge from this analysis is a largely unsatisfactory one. It will be shown that there was confusion, on the part of the drafters of PART IVA, as to the rationale for such powers as well as an inability to appreciate both the adverse effect which such powers would have on the ability of PART IVA to attain the policy goals that it was designed to secure and the fact that such powers, especially the section 33N power, are not necessary to protect class members and defendants facing a PART IVA proceeding. Attention will also be drawn to the fact that these termination powers have frequently resulted in courts spending more time on assessing whether it is appropriate for a case to proceed as a class proceeding than on the actual merits of the case. The need to avoid this result was one of the principal reasons that prompted the ALRC to reject the certification model.

The most unsatisfactory aspect of the Federal Court class action landscape that will emerge from this study is that properly instituted class proceedings have been discontinued by the Federal Court in circumstances where the class action device represented the only means by which most of the class members could seek access to legal remedies. PART IVA's termination powers have also been exercised in circumstances where the continuance of the class proceedings would have ensured effectuation of the purposes of litigative efficiency and economy that the class action

¹¹ The author was not able to find any articles in law journals that were entirely or substantially devoted to a study of these issues.

¹² In undertaking this analysis, reference will also be made to Part 4A of the *Supreme Court Act 1986* (Vic.). Part 4A, which was deemed to have come into operation in January 2000 (see *Cook v. Pasmenco Ltd.*, [2000] V.S.C. at para. 10, Hedigan J.), introduced in the Supreme Court of the Australian State of Victoria a statutory class action regime that is virtually identical to the PART IVA regime, including the provisions dealing with the commencement and termination of class actions.

device is designed to serve.

II. THE PART IVA REGIME

A. *The Recommendations of the Australian Law Reform Commission*

In December 1988, the ALRC released a report titled *Grouped Proceedings in the Federal Court*.¹³ This report contained a proposal to introduce in the Federal Court a grouped-proceeding model. Pursuant to this model, the representative plaintiffs and the class members would all be formal parties to the grouped proceedings.¹⁴ A unique and important feature of the model proposed by the ALRC was the lack of mandatory judicial certification, which would require that the representative plaintiff seek the formal authorisation of the Court before being allowed to conduct the proceedings on behalf of a group or class of claimants.¹⁵ This rejection, on the part of the ALRC, of a certification requirement was based on its assessment of how such a requirement had worked in Quebec—the only Canadian jurisdiction that had a detailed class action regime in place in 1988 when the ALRC completed its report—and in the United States. The ALRC's review of these regimes led it to conclude that:

[T]he preliminary matter of the form of the proceedings has often been more complex and taken more time than the hearing of the substantive issues. Because the court's discretion is involved, appeals are frequent, leading to delays and further expense. These expenses are wasteful and would discourage use of the procedure. There is no need to go to the expense of a special hearing to determine that the requirements have been complied with as long as the respondent has a right to challenge the validity of the procedure at any time.¹⁶

¹³ ALRC Report, *supra* note 9.

¹⁴ *Ibid.* at 45.

¹⁵ The ALRC is not the only law reform entity to have rejected the certification model. In fact, in 1995 a commission formed by the Swedish Government recommended a group action regime that did not include a certification procedure; see Roberth Nordh, "Group Actions in Sweden: Reflections on the Purpose of Civil Litigation, the Need for Reform, and a Forthcoming Proposal" (2001) 11 *Duke J. Comp. & Int'l L.* 381 at 396; Rogers, *supra* note 4, 5; and SALC Report, *supra* note 5 at 58-59. The new Swedish legislative group action regime, which commenced in January 2003, implemented this recommendation: see Per Henrik Lindblom and Roberth Nordh, "Scandinavian Developments: The New Swedish Act on Group Actions" (Paper presented at the Second Annual National Symposium on Class Actions—Osgoode Hall Law School Professional Development Program; 13-14 September 2002) at 3.

¹⁶ ALRC Report, *supra* note 9 at 63. A more colourful criticism of the certification procedure was provided by a Canadian commentator who lamented that "anything but the traditional A versus B litigation is treated as if it were a legal freak, a Frankenstein monster so dangerous that it must be kept in a cage until the plaintiff (or plaintiff's lawyer) has devoted a massive investment of time and money to a largely irrelevant ordeal." A. Roman as cited in Rogers, *supra* note 4 at 6.

This passage clearly highlights the fact that the ALRC was not rejecting the need for access to a class action regime to be dependent on compliance with specified prerequisites. The ALRC simply rejected the certification model as the most appropriate mechanism for determining whether the commencement prerequisites were satisfied. In the ALRC's view, the issue of whether, in a given case, the requirements for commencing a class action were complied with did not require a departure from the traditional litigation model, pursuant to which "the onus of establishing that any formal requirements have not been fulfilled" rests with the defendant.¹⁷

The rejection of a certification model was also based on the ALRC's conclusion that certification hearings do not always achieve one of their main objectives, namely, protecting class members.¹⁸ The ALRC perceptively drew attention to the fact that where the claims of the class members are individually non-recoverable, the denial of certification on the basis that the interests of the class members would not be adequately protected, would represent a grossly unsatisfactory measure. This is because, by definition, the class action device constitutes the only means by which persons with those types of claims may seek access to legal remedies.

The ALRC was of the view that the interests of class members and defendants could be protected by the selection of appropriate prerequisites for the commencement of grouped proceedings and by the implementation of a number of safeguards, including the conferral on the Federal Court of the power to terminate, in very limited circumstances, proceedings that have complied with the commencement criteria. According to the ALRC, a grouped proceeding should only be brought where two requirements are satisfied. The first requirement is that the material facts giving rise to each claim for relief, as pleaded in the statement of claim in respect of each class member's proceeding, must be the same as, or related to, the material facts giving rise to a claim for relief in the representative plaintiff's proceeding. This requirement is intended "to ensure a community of interest between the principal applicant and group members and to prevent disparate matters from being brought together."¹⁹ The other requirement is that there must be at least one question which is the same or common in the principal proceeding and in each class member's proceeding. In the ALRC's opinion, "[u]nless such a requirement is imposed the advantages of grouping may easily be outweighed by diversity and unmanageability of the

¹⁷ ALRC Report, *supra* note 9 at 63.

¹⁸ *Ibid.* at 63-64.

¹⁹ *Ibid.* at 58.

issues.”²⁰

The ALRC also indicated that grouped proceedings may be inappropriate, as distinct from vexatious or open to abuse, in four circumstances.²¹ The first circumstance is where the overall costs of a grouped proceeding to the parties and to the administration of justice are more than the combined costs of separate proceedings by the class members.²² The second is where the cost of identifying class members and distributing any monetary relief is excessive.²³ Thirdly, the ALRC stated that a grouped proceeding may be inappropriate when the representative plaintiff has excluded potential class members by defining the class too narrowly.²⁴ The ALRC recommended that there should be an express power for the Court to terminate the proceedings as grouped proceedings if the first two circumstances mentioned above are encountered. The solution to the third was to confer upon the Court the express power to stay the proceedings to allow the representative plaintiff to amend the application so as to ensure that the proceedings will bind all members of the relevant group. The ALRC also concluded that the Court should have the power to decide whether grouped proceedings should be allowed to continue where there were fewer than seven class members.²⁵

B. *The Policy Goals of PART IVA*

The Bill gives the Federal Court an efficient and effective procedure to deal with multiple claims. Such a procedure is needed for two purposes. The first is to provide a real remedy where, although many people are affected and the total amount at issue is significant, each person's loss is small and not economically viable to recover in individual actions. It will thus give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action [the access to justice goal].

The second purpose of the Bill is to deal efficiently with the situation where the damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent. The new procedure will mean that groups of persons, whether they be shareholders or investors, or people pursuing consumer claims, will be able to obtain redress and do so more cheaply and efficiently than would be the case with

²⁰ *Ibid.* at 59.

²¹ *Ibid.* at 64.

²² *Ibid.* at 65.

²³ *Ibid.* at 65-66.

²⁴ *Ibid.* at 66-67.

²⁵ *Ibid.* at 60-61.

individual actions [the judicial economy goal].²⁶

These comments quoted above were made in 1991 by the then Australian Attorney-General, Mr. Duffy, while explaining the objectives of the new class action regime that his government was introducing in the Federal Court, through the addition of a new PARTIVA to the FCAA.²⁷ PART IVA implements the ALRC's recommendation not to impose a certification requirement. But it adopts a class action model, instead of the grouped-proceeding model recommended by the ALRC. Pursuant to a class action model, the class members are bound by the outcome of the class proceeding despite the fact that only the representative plaintiffs and the defendants are formal parties to the proceeding.²⁸

C. Section 33C's Commencement Prerequisites

A proceeding is not properly commenced as a PARTIVA proceeding unless it satisfies each of the three threshold criteria specified in section 33C(1):²⁹

(a) 7 or more persons have claims against the same person; and

(b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and

(c) the claims of all those persons give rise to a substantial common issue of law or fact.³⁰

Section 33C(2)(a) provides that a class suit may be commenced whether or not the relief sought is, or includes, equitable relief; consists of,

²⁶ Austl., Commonwealth, House of Representatives, *Parliamentary Debates* (14 November 1991) at 3174 (Mr. Michael Duffy, Attorney-General). Similar reasoning was embraced by the Victorian Attorney-General, Mr. Hulls, when he introduced in the Victorian Parliament Part 4A: Austl., Victoria, Legislative Assembly, *Parliamentary Debates* (31 October 2000) at 1252.

²⁷ *Supra* note 8.

²⁸ See *Hansberry v. Lee*, 311 U.S. 32 at 40-41 (1940); ALRI Report, *supra* note 2 at 25; *Martin v. Wilks*, 490 U.S. 755, 762, n. 2 (1989); and *Research Corp v. Pfister Associated Growers Inc*, 301 F.Supp. 497, 501 (ND Ill 1969): "the very nature of a class action ... [is] to bind parties not before the court in person."

²⁹ See *Wong v. Silkfield Pty Ltd*, (1999) 165 A.L.R. 373 at 381, Gleeson C.J., McHugh, Gummow, Kirby & Callinan JJ. [Wong]; *Philip Morris (Australia) Ltd v. Nixon* (2000), 170 A.L.R. 487 at 514, Sackville J. [Philip Morris]. Section 33C(1) of Victoria's Part 4A contains identical prerequisites.

³⁰ *Supra* note 8, s. 33C(1). Finkelstein J. of the Federal Court has recently lamented that "[i]t is by no means clear precisely how and when the applicant must satisfy the Court that the conditions in s. 33C(1) have been met": *Au Domain Administration Limited v. Domain Names Australia Pty Ltd*. (2003), 202 A.L.R. 127 at 129 [Au Domain].

or includes, damages; includes claims for damages that would require individual assessment; or is the same for each person represented. Section 33C(2)(b) provides that a proceeding may be brought under PART IVA whether or not the proceeding is concerned with separate contracts or transactions between the defendant in the proceeding and individual group members and whether or not it involves separate acts or omissions of the defendant done or omitted to be done in relation to individual group members.³¹

III. JUDICIAL DISCONTINUANCE OF PROPERLY COMMENCED PART IVA PROCEEDINGS

A. Overview

When explaining the major features of the PART IVA regime, Mr. Duffy indicated that “[t]he other main feature of the Bill is the comprehensive powers given to the Court to ensure that the proceedings are not abused.”³² The then Attorney-General mentioned subsections 33ZG(b), 33L, 33M, and 33N as illustrations of PART IVA’s anti-abuse powers. But only section 33ZG(b) may accurately be described as a measure intended to prevent abuse.³³ Section 33ZG(b) provides that nothing in PART IVA affects “the Court’s powers under provisions other than this Part, for example, its powers in relation to a proceeding in which no reasonable cause of action is disclosed or that is oppressive, vexatious, frivolous or an abuse of the process of the Court.”³⁴

Section 33L provides that where, at any stage of the PART IVA proceeding, it appears likely that there are fewer than seven class members, the court is empowered to order that the proceeding continue as a PART IVA proceeding or that the proceeding no longer continue as a PART IVA proceeding. Section 33M empowers the Court to order the termination of a PART IVA proceeding where the cost to the defendant of identifying the class members and distributing to them the damages won by the representative plaintiff would be excessive, having regard to the likely total of those amounts. This power may only be exercised upon an application

³¹ Wong, *supra* note 29 at 376.

³² Austl., Commonwealth, House of Representatives, *Parliamentary Debates* (14 November 1991) at 3175 (Mr. Michael Duffy).

³³ See *Femcare Ltd. v. Bright* (2000), 172 A.L.R.713 at 734, Black C.J., Sackville & Emmett JJ.; and ALRC Report, *supra* note 9 at 63.

³⁴ *Supra*, note 8.

by the defendant.

Under section 33N(1) the Court, on application by the defendant or of its own motion, can order that the proceeding no longer continue as a PART IVA proceeding where it is satisfied that it is in the interests of justice to do so because:

- (a) the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or
- (b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding under this Part; or
- (c) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
- (d) it is otherwise inappropriate that the claims be pursued by means of a representative proceeding.

Sections 33L, 33M, and 33N of Part 4A of the *Supreme Court Act 1986* (Vic) are identical to PART IVA's subsections 33L, 33M, and 33N, with one interesting exception: section 33N of the Victorian regime, unlike its Federal counterpart,³⁵ may not be activated by the Supreme Court of Victoria on its own initiative.

Section 33P provides that where the court orders the discontinuance of a class suit under subsections 33L, 33M, or 33N, the proceeding may be continued as a proceeding by the representative party on his or her own behalf and "on the application of a person who was a group member for the purposes of the proceeding, the Court may order that the person be joined as an applicant in the proceeding."³⁶

³⁵ To the author's knowledge, the Federal Court has yet to issue a termination order on its own initiative. However, there have been instances of Federal Court judges "encouraging" PART IVA defendants to lodge s. 33N applications: see *Vasram v. AMP Life Limited*, [2000] F.C.A. 1676 at para. 15 and [2001] F.C.A. 602 at para. 1, Stone J. [*Vasram* cited to [2000] F.C.A. 1676]; and *Bowler v. Hilda Pty Ltd* (25 October 1996), No ACT G13 of 1995 (Federal Court) at 7, Finn J.

³⁶ *Supra*, note 8.

B. *Strategies Implemented by PART IVA Defendants*

The existence, and the uncertainty concerning the ambit,³⁷ of provisions such as section 33N have had an adverse effect on the way in which PART IVA litigation is generally conducted. Many defendants facing a PART IVA proceeding have brought motions before the Federal Court requesting it to exercise the power available under subsections 33L, 33M, and 33N to bring the proceedings, as PART IVA proceedings, to an end.³⁸ Frequently, these applications on the part of PART IVA defendants, have been accompanied by submissions to the effect that the proceedings had failed to satisfy one of the requirements found in section 33C(1).³⁹ These strategies have been partly responsible for the unsatisfactory scenario recently described as follows by Justice Finkelstein of the Full Federal Court:

There is a disturbing trend that is emerging in representative proceedings which is best brought to an end. I refer to the numerous interlocutory applications [lodged by defendants], including interlocutory appeals, that occur in such proceedings. This case is a particularly good example. The respondents have not yet delivered their defences yet there have been approximately seven or eight contested interlocutory hearings before a single judge, one application to a Full Court and one appeal to the High Court. I would not be surprised if the applicants' legal costs are by now well in excess of \$500,000. I say nothing about the respondents' costs. This is an intolerable situation ...⁴⁰

It would therefore appear reasonable to assert that the unfavourable scenario—of numerous motions and hearings as to whether the proceedings may be maintained as class proceedings—that prompted the ALRC in 1988 to reject the use of certification regimes currently exists

³⁷ See, e.g. S. Stuart Clark & Christina Harris, "Multi-Plaintiff Litigation in Australia: A Comparative Perspective" (2001) 11 *Duke J. Comp & Int'l L.* 289 at 303 where the conclusion is reached that "[t]he extent to which the courts will be prepared to exercise the power to terminate class actions has yet to be determined."

³⁸ The author is aware of more than 20 PART IVA proceedings where applications to terminate properly commenced PART IVA proceedings were lodged.

³⁹ See Jocelyn Kellam & S. Stuart Clark, "Multi-Party Actions in Australia" in Christopher Hodges, ed., *Multi-Party Actions* (Oxford: Oxford University Press, 2001) 269 at para. 15.51; Peta Spender, "Securities Class Actions: A View from the Land of the Great White Shareholder" (2002) 31 *Com. L. World Rev.* 123 at 139; R. Freeman, "Class Actions the Australian Way" (1999) 10 *Austl. Product Liability Rep.* 109 at 109; and Barry Lipp, "Mass Tort Class Actions under the Federal Court of Australia Act: Justice for All or Justice Denied?" (2002) 28 *Monash U.L. Rev.* 360 at 367, 373. This "double attack" strategy was implemented by defendants within twelve months of PART IVA coming into operation: see *Zhang v. Minister for Immigration, Local Government and Ethnic Affairs* (15 February 1993), No. WAG 214 of 1992 (Federal Court), French J.

⁴⁰ *Bright v. Femcare Limited* (2002), 195 A.L.R. 574 at 607 [Bright]. See also *Bray v. F Hoffmann-La Roche Ltd.* (2003), 200 A.L.R. 607 at 660, Finkelstein J.

in the Federal Court, despite the non-employment of such regimes.

C. *The North American Regimes*

Before considering in detail subsections 33L, 33M, and 33N, it is useful to consider the mechanisms that American and Canadian class action regimes have in place to determine which group litigation should be conducted as a class proceeding. As noted above, in the United States, Rule 23 provides that “the court must—at an early practicable time—determine by order whether to certify the action as a class action.”⁴¹ In Quebec, a class action may not be commenced except with the prior approval of the court obtained on a motion.⁴² In the other seven Canadian jurisdictions that have detailed class action regimes in place, the plaintiff is required to apply to the court for an order certifying the proceeding as a class proceeding and appointing the plaintiff as a representative plaintiff, generally within ninety days after a defence has been filed.⁴³

Properly commenced class proceedings may be discontinued as class actions or decertified by U.S. and Canadian Courts only where the certification criteria are no longer met. Section 10 of British Columbia’s *Class Proceedings Act*,⁴⁴ for instance, empowers the court, at any time after a certification order has been issued, to amend the certification order, decertify the proceedings, or make any other order it considers appropriate if the certification criteria are not satisfied. Once the proceedings are decertified, section 10(2) of the BC Act empowers the court to permit the proceedings to continue as one or more proceedings between different parties and may order the addition, deletion, or substitution of parties; the amendment of the pleadings; or may make any other order that it considers appropriate.⁴⁵ Rule 23 of the U.S. Federal Rules of Civil Procedure, does not expressly deal with decertification. Rule 23(c)(1)(C) simply provides that a certification order “may be altered or amended before final

⁴¹ *Supra* note 1, Rule 23(c)(1)(A).

⁴² *Quebec Code*, *supra* note 6, art. 1002.

⁴³ *Ontario Act*, *supra* note 6, s. 2(3); *BC Act*, *supra* note 6, s. 2(3); *Saskatchewan Act*, *supra* note 6, s. 4(3); *Newfoundland Act*, *supra* note 6, s. 3(3); *Manitoba Act*, *supra* note 6, s. 2(3); *Federal Court Rules*, *supra* note 6, Rule 299.17; and *Alberta Act*, *supra* note 6, s. 2(3).

⁴⁴ [BC Act], *supra* note 6.

⁴⁵ See also *Quebec Code*, *supra* note 6, art 1022; *Ontario Act*, *supra* note 6, s. 10; *Saskatchewan Act*, *supra* note 6, s. 12; *Newfoundland Act*, *supra* note 6, s. 11; *Manitoba Act*, *supra* note 6, s. 10; *Federal Court Rules*, *supra* note 6, Rule 299.21; and *Alberta Act*, *supra* note 6, s. 11. The Ontario and Quebec regimes do not empower the court to decertify proceedings on its own motion.

judgment.”⁴⁶ American courts have, nevertheless, adopted an approach to decertification that is similar to that mandated by the Canadian class action regimes.⁴⁷

The rationale for this narrow decertification power in Canadian class action regimes was succinctly explained by the Manitoba Law Reform Commission:

That procedure balances the need to ensure that claims that have been inappropriately certified do not continue, on the one hand, with the need to limit unnecessary and wasteful interlocutory litigation over the appropriateness of the certification.⁴⁸

A review of the certification criteria that Canadian representative plaintiffs need to comply with reveals another significant problem with the way in which Australia's PART IVA regulates the types of proceedings that may be brought as class proceedings. In Quebec, there are four certification criteria that need to be adhered to: (a) the claims of the group raise identical, similar or related questions of law or fact; (b) the facts alleged seem to justify the conclusions sought; (c) joinder is difficult and impracticable; and (d) the representative plaintiff will adequately represent the class.⁴⁹

In the other seven Canadian jurisdictions that have class action regimes in place, courts are required to certify proceedings as class proceedings where five conditions have been satisfied. The first condition is that the pleadings disclose a cause of action. The second is that there is an identifiable class of two or more persons that would be represented by the representative plaintiff. The third is that the claims of the class members raise common issues. The fourth is that a class proceeding would be the preferable procedure for the resolution of the common issues. The final condition is that there is a representative plaintiff who would fairly and adequately represent the interests of the class; has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding; and does not have, on the common issues for the class, an

⁴⁶ *Supra* note 1, Rule 23(c)(1)(C).

⁴⁷ See, e.g. *In re Intel Securities Litigation* 89 F.R.D. 104 at 113 (N.D. Cal 1981); *Pennsylvania v. Local Union*, 542 90 F.R.D. 589 at 591 (E.D. Pa. 1981); *Monaco v. Stone* 187 F.R.D. 50, 59 (E.D.N.Y. 1999); and *Alvarado Partners LP v. Mehta* 130 F.R.D. 673 at 676 (D. of Colorado 1990).

⁴⁸ MLRC Report, *supra* note 5 at 60. See also FC Committee Report, *supra* note 5 at 48-49; and OLRC Report, *supra* note 5 at 434.

⁴⁹ *Quebec Code*, *supra* note 6, art 1003. The certification criteria in South Australia are even easier to satisfy than the Quebec criteria. In fact, Rule 34.01 only requires the existence of “numerous persons [who] have common questions of fact or law requiring adjudication.”

interest in conflict with the interests of other class members.⁵⁰

With the possible exception of the fourth requirement (which will be explored in PART IV below), these requirements, unlike Australia's PART IVA termination criteria, are reasonably easy to apply as they predominantly require consideration of objective and clear factors. Another virtue of these criteria is that they do not result in the erection of significant barriers to the use of the class action device. This desirable state of affairs was the result of a decision by the various law reform bodies, upon whose recommendations most Canadian class action regimes were based, not to employ the Rule 23 certification criteria. This decision not to emulate the American regime was attributable to the fact that the certification criteria employed by Rule 23 had been found to be unduly restrictive and ambiguous.⁵¹ The U.S. certification criteria are discussed below, in the analysis of section 33N(1)(c).

D. Section 33L

Section 33L implemented a recommendation of the ALRC. This recommendation was based on the view that the grouping procedure should be available as long as there are, in addition to the representative plaintiff, seven class members. However, the ALRC also pointed out that there may be instances where it would be appropriate to have group litigation despite the fact that there are fewer than seven class members. Consequently, it recommended that "[i]n these circumstances, the Court should have a discretion to allow grouped proceedings to continue or to separate the proceedings and direct that they continue as individual proceedings."⁵²

It is important to note that a crucial aspect of the ALRC's recommendation was that the existence of a class with at least seven class members was not a condition that needed to be satisfied in order to initiate a grouped proceeding.⁵³ This recommendation was consistent with the ALRC's recognition that there will be circumstances where group litigation might be beneficial despite the small size of the class. It was also a logical move given that an important aspect of the ALRC's regime was the employment of an opt-out device. Under such regimes, the representative

⁵⁰ See *Ontario Act*, *supra* note 6, s. 5(1); *B.C. Act*, *supra* note 6, s. 4(1); *Saskatchewan Act*, *supra* note 6, s. 6; *Newfoundland Act*, *supra* note 6, s. 5(1); *Manitoba Act*, *supra* note 6, s. 4; *Federal Court Rules*, *supra* note 6, Rule 299.18(1); and *Alberta Act*, *supra* note 6, s. 5(1).

⁵¹ See e.g. MLRC Report, *supra* note 5 at 37.

⁵² ALRC Report, *supra* note 9 at 61.

⁵³ *Tropical Shine Holdings Pty Ltd. v. Lake Gesture Pty Ltd.* (1993), 118 A.L.R. 510 at 514, Wilcox J.

plaintiffs are not required to seek the consent of the class members before initiating group litigation on their behalf. Consequently, representative plaintiffs are frequently not in a position to provide precise details to the court as to the size of the class.⁵⁴

PART IVA also implements an opt-out regime. Class members have the right to opt out of the class action before a date fixed by the court and, except with the leave of the court, the hearing of the action is not to commence earlier than the date before which a class member may opt out of the proceeding.⁵⁵ A judgment handed down in a class action “binds all such persons [described or otherwise identified in the judgment] other than any person who has opted out of the proceeding.”⁵⁶ In order to accommodate this opt out model, section 33H(2) provides that an application commencing a PART IVA proceeding, in describing or otherwise identifying class members to whom the suit relates, need not “name, or specify the number of, the group members.”⁵⁷ But, despite the section 33H(2) directive, the existence of at least seven class members was included as a requirement for initiating PART IVA proceedings.⁵⁸ The lack of clarity on this issue was, of course, intensified by the conferral on the court of the discretion to allow the use of the PART IVA regime despite a failure to satisfy such a requirement.

This tension between the opt-out device and section 33L and the threshold requirements of section 33C(1)(a)⁵⁹ has resulted in conflicting views among Federal Court justices as to how the discretion provided to the Court by section 33L should be exercised. In *Tropical Shine Holdings Pty Ltd. v. Lake Gesture Pty Ltd.*,⁶⁰ Justice Wilcox indicated that to terminate a PART IVA proceeding because there are fewer than seven class members “would be a drastic course, often productive of injustice and inconvenience; and it would conflict with the policy expressed by section 51 of the *Federal*

⁵⁴ See *Bright v. Femcare Limited*, [2000] F.C.A. 1179 at para. 19, Lehane J.; *Mobil Oil Australia Pty Ltd v. Victoria* (2002), 189 A.L.R. 161 at 163-64, Gleeson C.J.; and *Au Domain*, *supra* note 30 at 129, Finkelstein J. The ALRC’s recognition of this fact led it to recommend that the initiating process need not name, or specify the number of, the class members: ALRC Report, *supra* note 9 at 157.

⁵⁵ *Supra* note 8, s. 33J.

⁵⁶ *Supra* note 8, s. 33ZB.

⁵⁷ *Supra* note 8, s. 33H(2).

⁵⁸ *Supra* note 53.

⁵⁹ With respect to s. 33C(1)(a) this problem has been addressed by holding that this provision is complied with where the representative plaintiff can demonstrate that it is likely that the group consists of at least seven members: see *supra* note 53 at 514, Wilcox J.; *Marks v. GIO Australia Holdings Ltd.* (1996), 63 F.C.R. 304 at 315,infeld J. [Marks]; and *Au Domain*, *supra* note 30 at 129, Finkelstein J.

⁶⁰ *Supra* note 53.

Court of Australia Act that proceedings are not invalidated by a formal defect or irregularity unless the Court thinks substantial and irremediable injustice has occurred.”⁶¹

A substantially different approach was followed in *Falfire Pty Ltd. v. Roger David Stores Pty Ltd.*,⁶² Justice Kiefel noted that while it could not be said that, as a result of section 33L, there is a presumption that a PART IVA proceeding requires more than seven class members, section 33L must be taken as a clear legislative directive that the employment of the PART IVA procedure may not be appropriate with respect to the claims of small groups. Justice Kiefel concluded that in cases where there are fewer than seven class members, the representative plaintiff “ought to be in a position to show why it is necessary or preferable to continue the proceedings in their present form.”⁶³ Similarly, in *Gold Coast City Council v. Pioneer Concrete (Qld) Pty Ltd.*,⁶⁴ the court held that the representative plaintiff needed to furnish evidence to demonstrate the existence of at least seven class members who were interested in recovering losses suffered as a result of the defendant’s conduct by means of a class proceeding.

Falfire and *Gold Coast* would tend to suggest that once the use of the PART IVA regime is challenged by the defendant facing the class action, there may be little difference between PART IVA and certification regimes, as far as a practical issue is concerned. This issue relates to which party bears the onus of proof, with respect to the crucial question of whether the aspiring representative plaintiff should be allowed to represent a class of claimants.⁶⁵ The judicial approach in *Falfire* and *Gold Coast* may be criticised for largely ignoring the directive in section 33L that, in the event of a PART IVA class being comprised of less than seven class members, one of the options that is available to the court is to allow the PART IVA litigation to proceed.

A further criticism may be levelled at *Gold Coast*. Making access to PART IVA dependent on clear evidence of the existence of seven class members, and on the fact that each of the represented persons was interested in seeking legal redress through the PART IVA proceeding, is

⁶¹ *Supra* note 53 at 515. See also *Marks*, *supra* note 59 at 315, Einfeld J. But see Paul Lynch, “Representative Actions in the Federal Court of Australia” (1994-95) 12 Austl. Bar Rev. 159 at 168, n. 28.

⁶² (25 September 1996), No. Q.G. 201 of 1995 (Federal Court), Kiefel J. [*Falfire*].

⁶³ *Ibid.* at 3.

⁶⁴ (9 July 1997), No. Q.G. 190 of 1996 (Federal Court) Drummond J. [*Gold Coast*].

⁶⁵ See also *Bray v. F Hoffmann-La Roche Ltd* (2002), 190 A.L.R. 1 at 16, Merkel J. [*Bray*]. But see *Finance Sector Union of Australia v. Commonwealth Bank of Australia*, [1999] F.C.A. 824 at para. 38, O’Connor J.

inconsistent with the opt-out regime employed in PART IVA and is tantamount to the introduction of an opt-in regime.⁶⁶

E. Section 33M

Section 33M implements a recommendation of the ALRC. The ALRC justified the power to terminate group litigation—where the cost of identifying class members and distributing amounts awarded would be excessive having regard to the likely total of those amounts—on the basis that “[a] primary goal of the proposed procedure is that of achieving legal redress where this can be done efficiently, rather than imposing punishment on a respondent.”⁶⁷

Section 33M has been criticized because it leaves class members without remedy just because they are disparate and their individual claims are relatively small. This is inconsistent with the access to justice aim of PART IVA and hinders the ability of PART IVA proceedings to enforce the law and discourage unlawful behaviour.⁶⁸ What is commonly referred to as behaviour modification has been regarded as one of the benefits that should result from the employment of the class action device. As recently noted by the Supreme Court of Canada: “[C]lass actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.”⁶⁹

Some of the problems discussed above could have been avoided had the Australian Parliament endorsed the amendments to section 33M proposed by the Australian Democrats. Under their proposed scheme, the scenario described in section 33M would not authorize the termination of

⁶⁶ N. Francey, “Class Actions” (Paper presented in Sydney on 9 February 1998 at the New South Wales Bar Association Continuing Legal Education Program) at 18-19. Similar criticism may be levelled at some of the reasoning that prompted Justice Lindgren to issue a section 33N order in *Australian Competition and Consumer Commission v. Giraffe World Australia Pty Ltd.* (1998), 156 A.L.R. 273 at 294 [*Giraffe World*]: “[T]here is no evidence as to the wishes of the group members. ... I take into account the real possibility of a conflict between the wishes of the [class representative] and [certain class members] as a factor weighing in favour of the making of an order that the proceeding no longer continue under Pt IVA.”

⁶⁷ ALRC Report, *supra* note 9 at 65.

⁶⁸ Coalition for Class Actions, *Representative Proceedings in New South Wales: A Review of the Law and a Proposal for Reform* (Public Interest Advocacy Centre, Sydney; 1995) at 20, 30-31 [PIAC Report]; and Austl., Commonwealth, Senate, *Parliamentary Debates* (13 November 1991) at 3025 (Senator Spindler).

⁶⁹ *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at 170, (2001), 205 D.L.R. (4th) 19, McLachlin C.J.C. (S.C.C.) [*Hollick* cited to S.C.R.].

a proceeding as a PART IVA proceeding. Instead, the court would have the discretion to direct that the class members in question not be paid. The representative plaintiffs could, however, apply to the court to have those funds transferred to a federal, state, or territory legal aid fund.⁷⁰ An alternative option would be to divert those funds to a public fund to finance class actions. These funds exist in a number of Canadian jurisdictions and have been recommended by the ALRC and the Law Reform Committee of South Australia.⁷¹

For section 33M to operate in a manner that is consistent with both the access to justice and the behaviour modification goals of class actions, an enlightened judicial approach, such as the one displayed by Justice O'Loughlin in *Australian Competition and Consumer Commission v. Golden Sphere International*,⁷² is necessary. Justice O'Loughlin declined to issue a section 33M order. This refusal was justified on the following basis:

This submission is entirely devoid of merit. Findings have been made against the respondents that they have knowingly engaged in breaches of the [*Trade Practices Act 1974* (Cth.)]: various sums of money, including an amount of \$254,650, have been intercepted by the authorities and if this submission was accepted those moneys would be disbursed to the respondents. That is enough to dismiss this submission summarily.⁷³

IV. SECTION 33N

A. Overview

Paragraphs (b), (c), and (d) of section 33N(1) were not based on any recommendations of the ALRC. In light of this significant departure from the ALRC's proposed regime with respect to what is, undoubtedly, one of the most important provisions of PART IVA, one would have expected a detailed explanation, in either the second reading speech on the Bill that contained PART IVA or in the Bill's Explanatory Memorandum, of the rationale for, and the intended operation of, these additional termination powers. Unfortunately, each of these official documents simply contains the inaccurate statement that section 33N was intended to empower the Court

⁷⁰ Austl., Commonwealth, Senate, *Parliamentary Debates* (13 November 1991) at 3034.

⁷¹ See Vince Morabito, "Federal Class Actions, Contingency Fees, and the Rules Governing Litigation Costs" (1995) 21 Monash U.L. Rev. 231 at 265-70; Thomas D. Rowe Jr., "Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions" (2003) 13 Duke J. Comp. & Int'l L. 125 at 136-38, 145-46; Cooper, *supra* note 9 at 246; and LRCI Report, *supra* note 2 at 41-42, 102-03.

⁷² (1998), 83 F.C.R. 424.

⁷³ *Ibid.* 447. See also *Bray*, *supra* note 65 at 15, Merkel J.

to prevent abuse of the PART IVA regime.⁷⁴ These documents also contain illustrations of the circumstances that may justify the exercise of the power contained in paragraph (b).⁷⁵ As the analysis of paragraph (b) will show, these examples are disconcerting as they would clearly undermine the ability of PART IVA to achieve the objectives that the drafters of PART IVA sought to secure through the introduction of such a regime.

It is therefore reasonable to conclude that the limited information provided by the creators of PART IVA as to the reasoning behind the enactment of section 33N evinces an alarming lack of clarity as to the problems that provisions such as section 33N were intended to deal with, and the impact that such powers might have on the ability of PART IVA to go beyond the limitations of the representative action procedure, the joinder procedure, and the test case device, and achieve an effective mechanism for dealing with legal disputes involving multiple claimants.⁷⁶

Therefore it is not surprising that, despite the fact that PART IVA has been in operation for more than twelve years, some uncertainty surrounds the crucial question of when the extensive termination powers contained in section 33N will be exercised⁷⁷ by the Federal Court.⁷⁸ Before considering the impact of each paragraph of section 33N(1), it is important to draw attention to a general feature of the Federal Court's approach to section 33N. In the first few years of operation of PART IVA, section 33N was rarely given an independent function by the Court. In this period, judicial conclusions that the relevant class suits were properly initiated were usually followed by a refusal to order that the actions should no longer continue as class actions.⁷⁹ Similarly, whenever the Court ruled that there had not been compliance with one or more of the prerequisites for the

⁷⁴ Explanatory Memorandum to the Federal Court of Australia (Amendment) Bill 1991 (Cth.) at para. 23 [*Memo*]; Commonwealth, House of Representatives, *Parliamentary Debates* (14 November 1991), 3175 (Mr. Michael Duffy, Attorney-General) [*Debates*].

⁷⁵ *Ibid.*

⁷⁶ See *Mobil Oil v. Victoria* (2002), 189 A.L.R. 161 at 169, Gaudron, Gummow & Hayne JJ. [*Mobil Oil*]; and *Dagi v. Broken Hill Proprietary Company Limited*, [2000] V.S.C. 486 at para. 40, Hedigan J. [*Dagi*].

⁷⁷ It is important, however, to appreciate a general feature, concerning the judicial interpretation of provisions governing class actions, that may have contributed to this level of uncertainty concerning s. 33N. This feature has been explained as follows by Hedigan J. of the Supreme Court of Victoria in *Dagi, ibid.* at para. 44: "[t]he inherent compromises involved in the establishment of class actions—group proceedings may be productive of judicial responses and perspectives of some variation."

⁷⁸ See *Dagi, ibid.* at para. 41, Hedigan J.; and Kellam & Clark, *supra* note 39 at para. 15.53.

⁷⁹ See e.g. *Marks, supra* note 59; *Huang v. Minister for Immigration and Multicultural Affairs* (1997), 50 A.L.J.D. 134 [*Huang*]; and *supra* note 53.

commencement of class suits found in section 33C(1), it would usually also reach the conclusion that, even if the class suit in question could be said to have been properly brought, the circumstances of the case justified the exercise of the Court's power to stop the litigation progressing as a PART IVA proceeding.⁸⁰

Consequently, section 33N did not constitute an additional obstacle for litigants acting on behalf of classes. Once the representative plaintiff was able to convince the court that the suit satisfied the prerequisites for the *commencement* of a PART IVA suit, the court was then unlikely to be persuaded that there existed grounds for the exercise of the Court's power to stop the *continuance* of such a suit. It is crucial to note that, during this period, most Federal Court judges interpreted PART IVA in an extremely flexible and broad manner.⁸¹

But from approximately the late 1990s onwards, there was an evident willingness, on the part of a significant number of Federal Court judges to give section 33N a role independent of section 33C(1), by exercising the section 33N power where section 33C(1) had been complied with.⁸² This greater prominence of section 33N resulted from the adoption, by an increasing number of judges, of a narrow construction of PART IVA provisions.⁸³ The important point, for present purposes, is that these changes in the impact of section 33N highlight quite vividly the inherently subjective nature of some of the major concepts contained in section 33N.

B. Paragraph (a)

Justice Lindgren has explained that this provision requires the court "to hypothesize that each group member conducts a separate proceeding."⁸⁴ But that task is rendered extremely difficult by the impossibility in many PART IVA proceedings of having precise details concerning the members of the class represented by the named plaintiff, because of the opt-out regime mentioned above.

The practical relevance of this paragraph is questionable given that

⁸⁰ See e.g. *Soverina Pty Ltd v. Natwest Australia Bank Ltd.* (1993), 40 F.C.R. 452; *Connell v. Nevada Financial Group Pty Ltd.* (1996), 139 A.L.R. 723.

⁸¹ Clark & Harris, *supra* note 37 at 320.

⁸² See Lipp, *supra* note 39 at 375.

⁸³ See Clark & Harris, *supra* note 37 at 303-04 and 319-20. The clearest example of this new judicial approach was the Full Federal Court's decision in *Philip Morris*, *supra* note 29 where a narrow construction of a number of provisions of PART IVA, including s. 33C(1), was embraced.

⁸⁴ *Giraffe World*, *supra* note 66 at 293.

it is difficult to think of circumstances where the total costs of at least seven individual proceedings would not exceed the costs of one class proceeding. It is therefore not surprising that PART IVA proceedings have been terminated on the basis of this provision on only two occasions.⁸⁵ On the first occasion, the discontinuance appeared to have been based more on the court's belief that the class probably comprised less than seven class members than on a genuine assessment that the costs of the class action would exceed the combined costs of the individual proceedings that might be pursued by the class members.⁸⁶

In the other PART IVA proceeding where a section 33N(1)(a) order was issued,⁸⁷ it was set aside by the Full Federal Court. The Full Court's decision was explained as follows by Justice Finkelstein:

The only foundation for the finding that the costs of many individual actions are likely to be less than the cost of one representative proceeding is an unsubstantiated assertion by the solicitor acting for the first respondent. ... [I]n the absence of a compelling explanation I would place no weight on such a statement because it is inherently unlikely to be true. Moreover, while the evidence shows that there are 61 group members known to the applicant's solicitors, the total number of group members is not yet known. That circumstance alone is sufficient to render irrelevant the solicitor's evidence: how could he say that one representative action would be more costly than many actions when he is unable to specify the number of actions with which the comparison is being made? In any event I simply do not accept that one action can cost more than what may amount to hundreds of actions.⁸⁸

C. *Paragraph (b)*

It will be recalled that this paragraph empowers the court to terminate properly commenced PART IVA proceedings where "all the relief sought can be obtained by means of a proceeding other than" a PART IVA proceeding. In the second reading speech, it is explained that the court will be able to discontinue a PART IVA proceeding where "the relief sought could be obtained by means of an individual proceeding."⁸⁹ The Attorney General may have been referring to a situation where the individual claims of the named plaintiffs and the class members may justify the initiation of individual proceedings; that is to say, where their claims are individually

⁸⁵ See also *Soverina* (1993), 40 F.C.R. 452 at 456.

⁸⁶ *Supra* note 64, and accompanying text.

⁸⁷ *Bright v. Femcare Limited* (2001), 188 A.L.R. 633.

⁸⁸ *Bright*, *supra* note 40 at 606. See also *Australian Competition and Consumer Commission v. Golden Sphere International* (1998), 83 F.C.R. 424 at 447, O'Loughlin J.; *Giraffe World*, *supra* note 66 at 293, Lindgren J.

⁸⁹ *Debates*, *supra* note 74.

recoverable. But in such circumstances the exercise of the power to discontinue PART IVA proceedings would be totally unsatisfactory. The major rationale for the class action device itself, the access to justice goal, and one of the essential features of the opt-out model—allowing the commencement of a class suit without the need to obtain the express consent of the affected class members⁹⁰—both constitute a clear and formal recognition of the existence of a number of factors or barriers which preclude many individuals from taking effective action to enforce their legal rights.⁹¹ Rendering the PART IVA regime unavailable to a group of claimants with individually recoverable claims would also run counter to the judicial economy purpose of class actions.

The Explanatory Memorandum⁹² draws attention to the fact that this power may be exercised where “a separate proceeding [could be] brought by the representative party whether singly or in conjunction with one or more other persons as applicants.”⁹³ The first part of the quoted example—concerning the ability of the representative plaintiff to initiate individual proceedings singly—provokes an obvious question: how does the ability of the former representative plaintiff to enforce her rights in a proceeding involving only herself, on the plaintiff’s side, benefit the former class members? The only possible answer to this question is that the individual proceedings of the former PART IVA plaintiff may benefit the former class members by being treated as a “test case.” The ALRC has explained that the term “test case” is sometimes used to describe proceedings “brought by a single applicant in circumstances where many other people may have the same or similar claims. This may be done by the unilateral action of the claimant.”⁹⁴ However, a number of significant problems exist with this device as a mechanism for dealing with mass claims. Test case litigation, unlike a class proceeding, is not binding on the claimants who are non-named plaintiffs.⁹⁵ Another fundamental problem

⁹⁰ Duffy revealed that an opt out procedure is preferable because it “ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceedings”: *ibid.*

⁹¹ “Many claims are not individually litigated, not because they are lacking in merit or unimportant to the potential claimant, but because of economic, social, and psychological barriers”: OLRC Report, *supra* note 5 at 139. See also Cooper, *supra* note 9 at 218.

⁹² *Memo*, *supra* note 74.

⁹³ *Ibid.* at para. 23.

⁹⁴ ALRC Report, *supra* note 9 at 22.

⁹⁵ See MLRC Report, *supra* note 5 at 11; ALRC Report, *supra* note 9 at 22-23; Deborah R. Hensler, “Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation” (2001) 11 Duke J. Comp. & Int’l L. 179 at 191; OLRC Report, *supra* note 5 at 88; Centre for Legal

with this device was described as follows by the Manitoba Law Reform Commission:

The plaintiff does not owe any legal obligation to have regard to the impact of their case on future litigation by others, and the lawyer is bound to obtain the most favourable result for the client—even if such a result may create a precedent which is not useful, or is potentially harmful, to other similar litigants. Furthermore, test cases are often settled on terms favourable to the plaintiff without a resolution of the underlying issues (such as admissions of liability, amendments of legislation, or changes in government programming) that gave rise to the litigation in the first place.⁹⁶

It is apparent that the discontinuance of a class proceeding on the basis of the availability of the other devices for dealing with group litigation, that the class action device was intended to replace, would constitute a strategy devoid of merit or indeed logic.⁹⁷

The second part of the comment from the Explanatory Memorandum quoted above, concerning the ability of the former representative plaintiff to issue separate proceedings in conjunction with some of the former class members as co-plaintiffs, refers to the joinder procedure. Order 6 Rule 2 of the *Federal Court Rules*⁹⁸ provides for the joinder of parties where there are common questions of law or fact and where all rights to relief claimed in the proceedings are “in respect of or arise out of the same transaction or series of transactions.”⁹⁹ Two or more parties may also be joined where the court gives leave to do so. The availability of the joinder device was relied upon by Justice Bongiorno of the Supreme Court of Victoria, in *McLean v. Nicholson*,¹⁰⁰ to exercise the power to terminate class actions provided by section 33N(1)(b) of Part 4A, a provision that is identical to section 33N(1)(b) of PART IVA.¹⁰¹

The proceedings in *McLean* were brought on behalf of a small

Process of the NSW Law Foundation, *Proposal for a New Supreme Court Rule on Representative Proceedings in NSW* (Public Interest Advocacy Centre; 1998) at para. 1.3 [NSW Law Foundation]; Kellam & Clark, *supra* note 39 at para. 15.14; and J. Donnan, “Class Actions in Securities Fraud in Australia” (2000) 18 Com. & Sec. L. J. 82 at 85.

⁹⁶ MLRC Report *supra* note 5 at 10. See also, Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, 4th ed. (St. Paul, Minn.: Thomson West, 2002) vol. 2 at 253.

⁹⁷ See *Chace v. Crane Canada Inc.* (1996), 5 C.P.C. (4th) 292 at 298-99, Mackenzie J.; and (1997), 14 C.P.C. (4th) 197 at 205-06, Cumming, Newbury & Huddart JJ.A.

⁹⁸ *Federal Court Rules* (Aus).

⁹⁹ *Ibid.*, o. 6 r. 2.

¹⁰⁰ [2002] V.S.C. 446 [*McLean*].

¹⁰¹ See also *supra* note 85 at 456, Hill J.; and *Dinning v. Federal Commissioner of Taxation* (1999), 99 A.T.C. 4621 at 4628, Ryan J.

group of claimants. The group's size was one of the major factors that led Justice Bongiorno to conclude that the employment of the joinder device constituted a more appropriate means of dealing with the dispute than the continuance of a Part 4A proceeding.¹⁰² Unfortunately, no consideration was given by the court as to whether the claims of the group members were individually recoverable. The Supreme Court also failed to refer to a number of advantages that are offered to class members by a class proceeding, which would not be available if they were joined as co-plaintiffs under the joinder procedure. As non-parties,¹⁰³ class members are generally not liable for costs¹⁰⁴ and are also able to avoid most of the other burdens associated with litigation.¹⁰⁵ This confers upon class members a privileged status not enjoyed by the representative parties and the class opponent.¹⁰⁶

This should be contrasted with the joinder device where all of the obligations of the ordinary rules of procedure apply to each of the joined plaintiffs as they are parties in the strict sense. Some obvious obligations are that each of the parties must exchange pleadings with each defendant and must submit to discovery and interrogatories.¹⁰⁷ Each named plaintiff may request the same of the defendant and to be given notice of, and participate in, any interlocutory steps. This means that, as highlighted by the Manitoba Law Reform Commission, the use of the joinder device "can result in cumbersome and expensive proceedings—precisely what class proceedings legislation is designed to avoid."¹⁰⁸ Furthermore, those in a

¹⁰² *Supra* note 100 at paras. 12-13.

¹⁰³ See *Johnson Tiles Pty Ltd. v. Esso Australia Ltd.* (1999), 166 A.L.R. 731 at 738, Merkel J.; and *Mobil Oil*, *supra* note 76 at 175, Gaudron, Gummow & Hayne JJ.

¹⁰⁴ *Supra* note 8, s. 43(1A). See also *Ontario Act*, *supra* note 6, s. 31(2); *Quebec Code*, *supra* note 6, art. 1006(f); *BC Act*, *supra* note 6, s. 37(4); *Saskatchewan Act*, *supra* note 6, s. 40(4); *Newfoundland Act*, *supra* note 6, s. 37(4); *Manitoba Act*, *supra* note 6, s. 37(4); *Federal Court Rules*, *supra* note 6, Rule 299.41; Part 4A, *Supreme Court Act 1986* (Vic), s. 33ZD; and *Phillips Petroleum Co. v. Shutts* 472 U.S. 797 at 810 (1995).

¹⁰⁵ See *American Pipe & Construction Co v. Utah*, 414 U.S. 538 at 552 (1974); *Van Gemert v. Boeing Co.*, 590 F.2d 433 at 440 (2nd Cir. 1978); *Resnick v. American Dental Association*, 95 F.R.D. 372, 379 (N.D. Ill. 1982); Richard H. Dreyfuss, "Class Action Judgment Enforcement in Italy: Procedural 'Due Process' Requirements" (2002) 10 Tul. J. Int'l. & Comp. L. 5 at 12-13; LRCI Report, *supra* note 2 at 62; and *Western Canadian*, *supra* note 6 at 397, McLachlin C.J.C. (S.C.C.).

¹⁰⁶ See Neil J. Williams, "Consumer Class Actions in Canada—Some Proposals for Reform" (1975) 13 Osgoode Hall L.J. 1 at 15; and *Mobil Oil*, *supra* note 76 at 172, Gaudron, Gummow and Hayne JJ.

¹⁰⁷ In *Western Canadian*, *supra* note 6 at 407, McLachlin C.J.C., the Supreme Court of Canada highlighted the fact that "[o]ne of the benefits of a class action is that discovery of the class representatives will usually suffice and make unnecessary discovery of each individual class member."

¹⁰⁸ MLRC Report, *supra* note 5 at 13. See also NSW Law Foundation, *supra* note 95 at para. 1.3.

continuing relationship with the defendant may fear victimization if they consent to be named as a plaintiff.¹⁰⁹ As a consequence, someone who is risk averse or litigation shy, receives inadequate information, or is deterred by psychological factors from coming forward and consenting to act as a plaintiff may be left with no legal remedy.¹¹⁰

The only interpretation of paragraph (b) that would not undermine the ability of PART IVA proceedings to fulfill their objectives is that termination of PART IVA proceedings under this provision is only justified where the claims of the class may be advanced under comprehensive class action regimes that may be available in other Australian jurisdictions.¹¹¹

D. Paragraph (c)

To bring to an end something that is inefficient or ineffective is obviously a desirable strategy. At first glance, this reasoning would appear to be particularly persuasive in the context of class actions given that, as colourfully noted by a Canadian judge, "class actions have the potential for becoming monsters of complexity and cost."¹¹² But upon closer analysis, a number of significant problems with paragraph (c) emerge. The application of the concepts of efficiency and effectiveness necessitates a certain degree of value judgment, and therefore creates uncertainty. It also extends to judges who do not look favourably upon class actions an effective means of restricting the use of the class action device.¹¹³ It is surprising that this

¹⁰⁹ See Vince Morabito, "Class Actions: The Right to Opt Out under PART IVA of the *Federal Court of Australia Act 1976* (Cth.);" (1994) 19 Melbourne U.L. Rev. 615 at 631.

¹¹⁰ See, generally, M. Tilbury, "The Possibilities for Class Actions in Australian Law" (Paper presented at the 1993 "Australian Legal Convention," in Hobart) at 6; OLRC Report, *supra* note 5 at 85-86; *Dolgow v. Anderson*, 43 F.R.D. 472, 484 (E.D.N.Y. 1968); Lord Woolf, *supra* note 5 at 225; Justice S. Charles, "Class Actions in Australia" (Paper presented at the "Australian Bar Association Conference," San Francisco, 1996) at 30; Donnan, *supra* note 95 at 85; Kellam & Clark, *supra* note 39 at paras. 15.11-15.12; *Chace* (1997) 14 C.P.C. (4th) 197 at 205-06, Cumming, Newbury & Huddart J.J.A.; and Justice D. Ryan, "The Development of Representative Proceedings in the Federal Court" (1993) 9 Austl. Bar Rev. 131 at 133.

¹¹¹ This was precisely the approach followed by Justice Emmett in *Murphy v. Overton Investments Pty Ltd.*, [1999] F.C.A. 1123 at para. 112 [*Murphy*]. See also *Poignand v. NZI Securities Australia Ltd.* (1992), 37 F.C.R. 363; *Kinross v. GIO Australia Holdings Ltd.* (1994), 55 F.C.R. 210 at 213, Einfeld J.; and *Bray*, *supra* note 65 at 15-16, Merkel J.

¹¹² *Tiemstra v. Insurance Corp. of British Columbia* (1996), 22 B.C.L.R. (3d) 49 at 61, Esson C.J.

¹¹³ There have been instances of proceedings not being allowed to progress under PART IVA and Part 4A where the decisions in question appear to have been attributable, more to the relevant judge's general understanding of what types of proceedings should be allowed to be conducted as class proceedings, than to an application of any actual restrictions found in the provisions of the Federal and Victorian class action regimes: See, e.g., *Philip Morris*, *supra* note 29 at 490, Spender J. and at 523,

potential problem was overlooked by the drafters of PART IVA. In fact, the extremely narrow construction of the “same interest” requirement, for the purposes of the traditional representative action procedure,¹¹⁴ was largely attributable to a certain degree of judicial hostility towards the concept of named plaintiffs being able to affect the rights of others—the represented persons—who have no real control over the proceedings in question.¹¹⁵

These criticisms should not be taken as a rejection of the relevance to class actions of the goals of efficiency and effectiveness. These concepts should be utilized in selecting the requirements that aspiring class representatives must fulfill, before being able to have recourse to the PART IVA regime, and the types of procedures and safeguards that should be in place to manage a PART IVA proceeding. But these subjective concepts should not themselves be used as criteria for determining which proceedings should be allowed to continue as class proceedings. The discussion in Part II above has shown that the approach that is advocated here is essentially the approach that was embraced by the ALRC. The two commencement prerequisites,¹¹⁶ the narrow termination powers, and the various judicial powers to manage the proceedings that were recommended by the ALRC, were the result of the ALRC’s assessment of what was needed to ensure that grouped proceedings were efficient and effective, as well as fair, to all those affected by such proceedings.

In practice, section 33N(1)(c) has resulted in the introduction of a requirement that is broadly similar to one of the certification criteria found in Rule 23. Certification of a proceeding as a class action in U.S. Federal Courts requires compliance with two “steps.” First, a class “may sue or be sued” under Rule 23 if the proposed class satisfies the four threshold requirements of Rule 23(a): (1) numerosity—the class must be so numerous that joinder of all members is impracticable; (2) commonality—there must be questions of law or fact common to the class; (3) typicality—the claims or defences of the representative parties must be

Sackville J.; *McLean*, supra note 100 at paras. 7, 10, Bongiorno J. For an illustration of a diametrically opposed approach, see *Zhang de Yong v. Milgea* (1993), 118 A.L.R. 165 at 183, French J. [*Zhang*].

¹¹⁴ See, e.g., Order 6 rule 13 of the *Federal Court Rules* (Aus.), supra note 98, which provides that “where numerous persons have the same interest in any proceeding the proceeding may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.”

¹¹⁵ See, e.g., *Markt and Co Ltd v. Knight Steamship Co Ltd*, [1910] 2 K.B. 1021 at 1040, Fletcher Moulton L.J.; *Esanda Finance Corporation Ltd v. Carnie* (1992), 29 N.S.W.L.R. 382 at 404, Meagher J.A.

¹¹⁶ As recently pointed out by Lindgren J., “[t]here are sufficient procedural safeguards in s. 33C(1)(b) and (c) to protect the integrity of the court’s processes”: *Bray v. F Hoffman-La Roche Ltd*. (2003), 200 A.L.R. 607 at 631.

typical of the claims or defences of the class; and (4) adequacy of representation—the representative parties must fairly and adequately protect the interests of the class.

In addition, plaintiffs must satisfy one of the alternative conditions found in Rule 23(b). Rule 23(b) creates three different types of class actions. The one that is of interest for present purposes is the third type, which deals essentially with class actions where damages are sought. The requirements for this type of class proceeding are found in Rule 23(b)(3), which imposes the requirements that the common questions of law or fact predominate over any questions affecting only individual class members¹¹⁷ and that the class action is superior to other available methods for the fair and efficient adjudication of the controversy.¹¹⁸

The requirement that common issues predominate over non-common issues has been “a bone of much contention”¹¹⁹ and has severely restricted the availability of Rule 23(b)(3) class actions.¹²⁰ But a broadly similar requirement appears to exist under PART IVA, given that the Federal Court has terminated PART IVA proceedings (or indicated that it would be appropriate to take such a step) pursuant to section 33N(1)(c) (and sometimes pursuant to section 33N(1)(d)),¹²¹ on the ground that the need to examine the individual circumstances of some or many of the class members would render a PART IVA action an inefficient and ineffective means of dealing with the claims of the class members.¹²²

¹¹⁷ See Civil Rules Advisory Committee, “Proposed Amendments to the Rules of Civil Procedure for the United States District Courts” (1966), 39 F.R.D. 69 at 103; and John C. Coffee, Jr., “Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation” (2000) 100 Colum. L. Rev. 370 at 400.

¹¹⁸ Conte & Newberg, *supra* note 96 at 249 have explained that “some courts have denied small claimant classes for lack of superiority by focusing on manageability difficulties or other superiority factors.”

¹¹⁹ ALRI Report, *supra* note 2 at 69.

¹²⁰ See L.J. Harbour, S. Croft & T. Sheehan, “Class Actions: An American Perspective” in Hodges, *supra* note 39, 205 at 214-17; *Amchem Products Inc v. Windsor* 521 U.S. 591 at 623-25 (1997); Scott S. Partridge & Kerry J. Miller, “Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions” (2000) 74 Tul. L. Rev. 2125 at 2139-40; and Conte & Newberg, *supra* note 96 at 233-35.

¹²¹ See e.g. *Australian Competition and Consumer Commission v. Internic Technology Pty Ltd* (14 July 1998), Australia No NG 395 of 1998 (Federal Court), Lindgren J.

¹²² See *Schanka v. Employment National (Administration) Pty Ltd* (1998), 86 I.R. 283 at 294, Moore J.; *Murphy*, *supra* note 110 at paras. 113-14, 121; *Murphy v. Overton Investments Pty Ltd.*, [1999] F.C.A. 1673 at paras. 31, 35, Emmett J. [*Overton*]; *Philip Morris*, *supra* note 29 at 493, Hill J. and at 521, Sackville J.; *Vasram*, *supra* note 35 at paras. 7, 14; *Vasram v. AMP Life Limited*, [2000] FCA 1916 at para. 21, Stone J. [*AMP*]; *Bright*, *supra* note 87 at 648, 651, Stone J.; *Connell v. Nevada Financial Group* (1996), 139 A.L.R. 723 at 733, Drummond J.; and *Tsang v. Uvanna* (December 1995), Australia No

This judicial development is grossly unsatisfactory for a number of reasons. In 1999, the High Court of Australia rejected the view, which had been formulated by the Full Federal Court, that determining whether a common issue was substantial, for the purposes of section 33C(1)(c), required a comparison of the significance of the common issues with that of the uncommon issues to the determination of the claims of the class members.¹²³ Some of the reasons that prompted a judicial rejection of the need to consider the proportionality involved between the common issues and the non-common issues, in relation to section 33C(1)(c), were explained by Justice Wilcox of the Federal Court: "It is difficult to see why it is necessary, or legitimate, to compare the substantiality of a common issue with the substantiality of any non-common issues ... to take this course is to encourage respondents to raise artificial non-common issues."¹²⁴

The problems identified by Justice Wilcox are not removed or diminished merely because the flawed judicial approach in question is considered in the context of section 33N and not with respect to section 33C(1).¹²⁵ The judicial addition of a requirement that bears some similarity to the United States predominance of common questions condition may also be said to be inconsistent with the intention of the drafters of PART IVA. The report of the ALRC contained an extensive discussion and analysis of Rule 23. Accordingly, it appears reasonable to act on the premise that the drafters of PART IVA were aware of the U.S. predominance of the common issues requirement. The fact that no similar provision appears in PART IVA logically points to a desire not to impose a similar requirement on Australian class representatives. The inappropriateness of a judicial approach that regards as relevant to section 33N an assessment of the impact that the common issues will have on the overall progress and outcome of the proceedings may also be demonstrated by considering the practical focus of class action regimes, the purposes of PART IVA, and the general scheme of PART IVA.

NG505 of 1994 (Federal Court), Lockhart J.

¹²³ *Supra* note 29.

¹²⁴ Justice M. Wilcox, "Representative Proceedings in the Federal Court of Australia: A Progress Report" (1996-97) 15 *Austl. Bar Rev.* 91 at 93.

¹²⁵ One difference between these two provisions should, however, be noted. If there is a failure to comply with one of the requirements found in s. 33C(1), the court has no power to allow the litigation to proceed under PART IVA. On the other hand, the power under s. 33N is discretionary: *Huang, supra* note 79 at 137, *Lehane J.*; *Vasram, supra* note 35 at para. 9, *Stone J.*

1. Practical Focus of Class Action Devices

Justice Gillard of the Supreme Court of Victoria has recently explained that:

[I]t is important that the Court conducts group proceeding litigation in a practical manner and ensures that as many questions of law and fact that have a degree of commonality are decided ... [A] group proceeding is not concerned with the complete cause of action of a claimant, in the sense that all elements of the cause of action and issues raised are determined in the proceeding. The Court considers and determines the common questions of law and fact.¹²⁶

Once this feature of class proceedings is acknowledged, it is irrational to view the efficiency and effectiveness of a class proceeding from the perspective of arriving at a final judicial determination with respect to the claims of each of the class members. A more realistic and sensible approach is to require a class proceeding to be an efficient and effective way of resolving the common issues of law or fact. This is the approach that is followed by seven of the eight Canadian jurisdictions that have class action regimes. In fact, as noted in Part III, in these jurisdictions the fourth certification prerequisite is that a class proceeding be the preferable procedure for *the resolution of the common issues*.¹²⁷ Six of these Canadian class action regimes expressly indicate that the third certification prerequisite—that the claims of the class members raise common issues—may be satisfied whether or not those common issues predominate over issues affecting only individual members.¹²⁸ This directive to the courts managing class proceedings was prompted by one of the first judicial pronouncement in Ontario on the common issues requirement. In *Abdool*

¹²⁶ *Johnson Tiles Pty Ltd v. Esso Australia Pty Ltd.*, [2003] V.S.C. 27 at para. 42, Gillard J. [*Esso*]. See also Wilcox, *supra* note 124 at 93; OLRC Report, *supra* note 5 at 305; *McLean*, *supra* note 100 at para. 5; Bongiorno J.; and *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 at 359, Cumming, Newbury & Huddart J.J.A. [*Campbell*].

¹²⁷ "It is to be noted that a class proceeding does not have to be the preferable procedure for resolving the whole controversy, but merely the preferable procedure for resolving the common issues": *Campbell*, *supra* note 126 at 362, Cumming, Newbury & Huddart J.J.A. Four of these regimes have added the words "fair and efficient" resolution of the common issues: see *B.C. Act*, *supra* note 6, s. 4(1)(d); *Manitoba Act*, *supra* note 6, s. 4(d); *Federal Court Rules*, *supra* note 6, Rule 299.18(1)(d); and *Alberta Act*, *supra* note 6, s. 5(1)(d).

¹²⁸ See *B.C. Act*, *supra* note 6, s. 4(1)(c); *Saskatchewan Act*, *supra* note 6, s. 6(c); *Newfoundland Act*, *supra* note 6, s. 5(1)(c); *Manitoba Act*, *supra* note 6, s. 4(c); *Federal Court Rules*, *supra* note 6, Rule 299.18(1)(c); and *Alberta Act*, *supra* note 6, s. 5(1)(c).

v. Anaheim Management Ltd.,¹²⁹ Justice Montgomery of the Ontario Court (General Division) declined to certify a class action because the individual issues predominated over the issues common to the proposed class.¹³⁰

But, curiously, in four of the Canadian class action regimes that contain the directive that common issues need not predominate over individual issues, courts are still required to compare common issues with non-common issues. In fact, in applying the fourth certification requirement—of whether the class proceeding would be the preferable procedure for the resolution of the common issues—they are required to consider five factors, one of which is whether the common issues predominate over the individual issues.¹³¹ This approach—pursuant to which the significance of the common issues vis-à-vis the non-common issues is not, contrary to Rule 23, a mandatory certification requirement but is instead one of the factors to be considered in applying the preferable procedure requirement—can be attributed to a recommendation made by the Ontario Law Reform Commission (OLRC) in 1982.¹³² This recommendation was not adopted by the Ontario Attorney-General's Advisory Committee on Class Action Reform¹³³ in 1990 and by the Ontario legislature in 1992 when it enacted the *Class Proceedings Act*.¹³⁴ But, as indicated above, the approach recommended by the OLRC was embraced by four other Canadian jurisdictions, namely, British Columbia, Newfoundland, Alberta, and the Federal Court. The implementation of the OLRC's recommendation has meant that the class action regimes in these

¹²⁹ (1993), 15 O.R. (3d) 39.

¹³⁰ See Rogers, *supra* note 4 at 8; and Garry D. Watson, "Initial Interpretations of Ontario's *Class Proceedings Act*: The Anaheim and the Breast Implant Actions" (1993) 18 C.P.C. (3d) 344.

¹³¹ *B.C. Act*, *supra* note 6, s. 4(2); *Newfoundland Act*, *supra* note 6, s. 5(2); *Federal Court Rules*, *supra* note 6, Rule 299.18(2); and *Alberta Act*, *supra* note 6, s. 5(2). The other four criteria are whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions, whether the class proceeding would involve claims that are or have been the subject of any other proceedings, whether other means of resolving the claims are less practical or less efficient, and whether the administration of the proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

¹³² OLRC Report, *supra* note 5 at 407-08. See also W. A. Bogart, "Questioning Litigation's Role—Courts and Class Actions in Canada" (1987) 62 Ind. L. J. 665 at 692-93. Under the 1976 *Uniform Class Actions Act* (see *supra* note 3), this factor is but one "of at least of thirteen criteria which the court is to consider before determining whether the class action should be permitted 'for the fair and efficient adjudication of the controversy'": Scher, *supra* note 3 at 75.

¹³³ Ontario Committee Report, *supra* note 5 at 30. It was also rejected by the Alberta Law Reform Institute on the basis that it "might invite a predominance debate of the sort that has been problematic in the United States": ALRI Report, *supra* note 2 at 73.

¹³⁴ [Ontario Act], *supra* note 6.

four jurisdictions are more restrictive than the other Canadian regimes that do not expressly direct the courts to consider the significance of the common issues.¹³⁵

The adverse impact on the availability of the class action procedure that is caused by an approach that requires courts to compare the significance of common issues, to the resolution of the controversy, with the significance of non-common issues is also highlighted by recent judicial developments concerning the preferable procedure requirement under the Ontario Act. As indicated above, the Ontario legislature did not include a requirement that courts consider whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members in determining whether the class action device would be the preferable procedure for the resolution of the common issues. Indeed, the Ontario Act does not spell out any factors that are to be considered by the Court in applying the preferable procedure requirement. In 2001, the Supreme Court of Canada held that Ontario courts, when applying the preferable procedure requirement, must consider the significance of common issues to the resolution of the claims pursued by the class, despite the lack of any such requirement in the *Ontario Act*.¹³⁶ This judicial development has been directly responsible for a drastic increase in the number of certifications that have been denied by Ontario courts.¹³⁷

2. The Judicial Economy Goal of Class Actions

Terminating a class proceeding because individual issues are more significant than issues that are common to the claims of all the class members generates results that are inconsistent with the judicial economy aim of class actions.¹³⁸ In *Bright v. Femcare Limited*, Justice Lindgren

¹³⁵ See *supra* note 112 at 58, Esson C.J.; ALRI Report, *supra* note 2 at 70-71; and LRCI Report, *supra* note 2 at 70.

¹³⁶ The Court unpersuasively rejected the relevance of the lack of express reference to this requirement in the *Ontario Act* on the basis that it cannot be concluded "that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context": *supra* note 69 at 36, McLachlin C.J.C. Ironically, at the same time the Court urged Ontario courts not to "take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters" (*ibid.* at 29).

¹³⁷ See Garry D. Watson, "Annual Survey of Recent Developments on Civil Procedure" in Garry D. Watson and M. McGowan, *Ontario Civil Practice 2004* (Toronto: Carswell, 2003), ch 4.

¹³⁸ See Lipp, *supra* note 39 at 374-76; *Halvorson v. British Columbia (Medical Services Commission)*, [2003] B.C.D. Civ J LEXIS 524 at 27-28, Donald, Huddart & Mackenzie J.J.A. ("the Court's interest in avoiding a multiplicity of similar claims also weighs in favour of class proceedings"); and *Dalhuisen (Guardian ad Litem) v. Maxim's Bakery Ltd.*, [2002] B.C.D. Civ. J. 731 at para. 19,

illustrated this proposition as follows:

But let it be assumed that in respect of the resolution of each [class member's] claim, two-thirds of the time to be spent will have to be devoted to issues unique to that claim and one-third to issues which are common to all claims. Is it still not preferable that the common issues be heard and determined once so as to be binding as between each claimant and the respondents rather than many times?¹³⁹

It is therefore disappointing that in several cases where an order was issued under section 33N(1)(c), the court based its ruling partly on the finding that having the former class members issue individual proceedings, which could be heard by the same court, was a more efficient means of dealing with the legal dispute in question than the continuance of a PART IVA proceeding.¹⁴⁰ This was the approach followed by Justice Stone, the trial judge in *Bright*.¹⁴¹ One of the factors that persuaded Justice Stone to discontinue a PART IVA proceeding, pursuant to section 33N(1)(a) and (c), was that the techniques of case management in individual actions could reduce the cost of individual claims by, for instance, having the same judge deal with all the individual claims.¹⁴²

The Full Federal Court set aside Justice Stone's order. Two members of the Full Court, Justices Lindgren and Finkelstein, specifically dealt with this aspect of Justice Stone's judgment. They both pointed out that the scenario envisaged by Justice Stone, of the same judge hearing all the individual claims, would only be possible if the proceedings were all commenced in the same state. In the view of Justices Lindgren and Finkelstein, it could not be safely assumed that this would, in fact, occur.¹⁴³ Justice Finkelstein added that what Justice Stone had in mind was:

[A] situation where there would be orders to consolidate separate claims or have them heard either concurrently or sequentially before the same judge. One possible consequence of this approach is that the contemplated procedure will in substance bring into existence what is in effect, but not in name, a representative proceeding, which is what we already have. ... In any event ... the possibility of apprehended bias by prejudgment may be a legal barrier that

Burnyeat J. ("judicial economy is not served by 48 separate actions").

¹³⁹ *Bright*, *supra* note 40 at 589. See also *Batten v. CTMS Ltd.*, [2001] F.C.A. 1493 at para. 12, Kiefel J., where attention is drawn to the fact that "a proceeding which reduces a substantial amount of evidence which would need to be tendered and considered in a large number of cases would come within" the judicial economy objective of PART IVA.

¹⁴⁰ See e.g. *Overton*, *supra* note 122 at para. 42, Emmett J.; and *AMP*, *supra* note 122 at para. 21, Stone J.

¹⁴¹ *Supra* note 87.

¹⁴² *Ibid.* at 651.

¹⁴³ *Bright*, *supra* note 40 at 588-89, Lindgren J., and at 606-07, Finkelstein J.

would prevent one judge from hearing related claims.¹⁴⁴

Even if one accepted that having numerous individual proceedings before the same judge constituted, in some cases, a more efficient and effective option than having one class proceeding, attainment of this allegedly desirable scenario is only possible if the former class members are both able and willing to initiate individual proceedings. Where this is not the case, an order to terminate a PART IVA proceeding will undermine the ability of the PART IVA regime to secure its access to justice rationale.¹⁴⁵ The tension between section 33N and the access to justice goal of PART IVA is fully explored below, in the analysis of paragraph (d).

3. The General Scheme of PART IVA

A judicial approach that views the need to assess the individual circumstances of some or many of the class members as something that is *prima facie* undesirable,¹⁴⁶ and which might thus justify the discontinuance of a class proceeding, is also difficult to reconcile with the general scheme of PART IVA.¹⁴⁷ In Part II, above, it was noted that section 33C(2) provides a clear directive to the court that access to PART IVA is not to be denied simply because the proposed class proceeding includes claims that would require individual assessment. This fact has been recognized by the Full Federal Court as it has noted that the purpose of this provision “is to make clear that it is not a legitimate objection to a [PART IVA] proceeding that it involves particular claims for relief or disparate issues.”¹⁴⁸

Furthermore, PART IVA arms the court with extensive powers to deal with non-common issues raised by the claims of some or most of the class members.¹⁴⁹ Section 33Q(1), for instance, empowers the court to give

¹⁴⁴ *Ibid.* at 607.

¹⁴⁵ Conte & Newberg, *supra* note 96 at 251: “When the claims of class members are small, denial of a class action would effectively exclude them from judicial redress.”

¹⁴⁶ *Quantas Airways Ltd v. Cameron* (1996), 66 F.L.R. 246 at 298, Lehane J.

¹⁴⁷ As noted by Einfeld J. in *Marks*, *supra* note 59 at 311: “PART IVA anticipates that individuals in the group will have differing circumstances.”

¹⁴⁸ *Finance Sector Union of Australia v. Commonwealth Bank of Australia* (1999), 166 A.L.R. 141 at 147, Wilcox, Ryan & Madgwick JJ. [*Finance Sector*]. See also Ryan, *supra* note 110 at 137: “The added flexibility inherent in s. 33C(2) is most desirable and conforms with the general policy ... of promoting the efficient use of court resources and minimising the cost of litigation to the parties.”

¹⁴⁹ See Wong, *supra* note 29 at 334, Foster J.; *Community & Public Sector Union v. Victoria*, [1999] F.C.A. 743 at para. 23, Marshall J. [*Community*]; *Finance Sector*, *supra* note 148 at 145, Wilcox, Ryan & Madgwick JJ.; and *Dagi*, *supra* note 76 at para. 46, Hedigan J. Similar provisions appear in Part 4A: *Mobil Oil*, *supra* note 76 at 164, Gleeson C.J. and at 199, Kirby J.

directions in relation to the determination of issues which have been left unresolved by the determination of the common issues.¹⁵⁰ Section 33Q(2) allows the court to establish sub-groups so as to deal with issues common to the claims of only some of the group members. The power to create sub-groups is an effective judicial tool for protecting the interests of both class members¹⁵¹ and defendants.¹⁵²

Section 33R(1) allows an individual group member to appear in the class proceeding for the purpose of determining an issue that relates to the claims of that member only.¹⁵³ Section 33S comes into play where an issue cannot properly or conveniently be dealt with under section 33Q or section 33R. Section 33S(a) provides that if the issue concerns the claim of a particular member only, the court may give directions relating to the commencement and conduct of a separate proceeding by that member; while section 33S(b) provides that if the issue in question is common to the claims of all members of a sub-group, the court may give directions relating to the commencement and conduct of a representative proceeding in relation to the claims of those members.

In light of the analysis above, it is pleasing to note that some Federal Court justices have rejected propositions advanced by defendants that the need for evidence to be given of the individual circumstances of class members justified a section 33N order.¹⁵⁴ In some circumstances, this approach was based, to some extent, on the procedural safeguards found in PART IVA to ensure that class actions are not misused.¹⁵⁵ The Full Federal Court's decision in *Bright*, referred to above, is also encouraging to the extent that it reminds trial judges that the crucial issue of whether a proceeding should be discontinued as a PART IVA proceeding must be governed by the criterion, found in section 33N itself, of what is "in the interests of justice." This aspect of *Bright* is considered in the analysis of

¹⁵⁰ As explained by French J. in *Zhang*, *supra* note 113 at 185, s. 33Q "contemplates the hiving off of individual claims when the common determination does not finally determine the claims of all group members."

¹⁵¹ See *Nixon v. Philip Morris (Australia) Ltd.* (1999), 165 A.L.R. 515 at 546, Wilcox J.; *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 at 179, n. 16 (1974); and *Mendoza v. United States*, 623 F.2d 1338 at 1349-50 (9th Cir. 1980).

¹⁵² LRCI Report, *supra* note 2 at 74.

¹⁵³ In *Wong*, *supra* note 29 at 380, Gleeson C.J., McHugh, Gummow, Kirby & Callinan JJ., the High Court referred to s. 33R as an example of the safeguards found in PART IVA.

¹⁵⁴ See e.g. *Marks*, *supra* note 59 at 311-15 and the cases cited therein; *Johnson Tiles Pty Ltd. v. Esso Australia Pty Ltd.*, [1999] F.C.A. 636 at para. 20, Black C.J., North & Finkelstein JJ. [*Johnson*]; and *Community*, *supra* note 149 at paras. 24-26, Marshall J.

¹⁵⁵ See e.g. *Johnson Tiles Pty Ltd. v. Esso Australia Pty Ltd.* [1999] F.C.A. 56 at para. 62, Merkel J.

paragraph (d).

E. *Paragraph (d)*

As noted by Justice Lindgren in *Australian Competition and Consumer Commission v. Giraffe World Australia Pty Ltd.*, “[t]he words ‘otherwise inappropriate’ are words of wide import.”¹⁵⁶ At the same time, “the legislature has not given much assistance as to the criteria for determining the appropriateness or inappropriateness of pursuing claims by means of a representative procedure.”¹⁵⁷ It is, therefore, not surprising that there has been some confusion on the part of the Federal Court as to when this power is to be exercised.¹⁵⁸

The drafting of section 33N(1)(d) was clearly influenced by the power found in Order 6 rule 13 of the *Federal Court Rules* to terminate representative proceedings which have adhered to the “same interest” requirement. This power is found in the words “the proceeding may be commenced, and, *unless the Court otherwise orders*, continued.”¹⁵⁹ In drafting a termination power for a new¹⁶⁰ and controversial device, such as the class action device, it is understandable that the drafters of PART IVA sought to emulate a procedure that has been available for more than 100 years.¹⁶¹ But, unfortunately, they failed to appreciate the great uncertainty that has surrounded the ambit of this termination power.¹⁶²

¹⁵⁶ *Supra* note 66 at 290. See also Vince Morabito & J. Epstein, *Class Actions in Victoria—Time for a New Approach* (Report commissioned by the Victorian Attorney-General’s Law Reform Advisory Council; 1997) at para. 6.19; Freeman, *supra* note 39 at 111; Ryan, *supra* note 110 at 137; and Lipp, *supra* note 39 at 376.

¹⁵⁷ *Overton*, *supra* note 122 at para. 115, Emmett J.

¹⁵⁸ See e.g. *Giraffe World Australia Pty Ltd. v. Australian Competition and Consumer Commission*, [1998] F.C.A. 1560 where a s. 33N(1)(d) order was justified on the ground that there had been non-compliance with s. 33C(1).

¹⁵⁹ *Federal Court Rules (Aus)*, *supra* note 98, o. 6 r. 13(1) [emphasis added].

¹⁶⁰ See Tilbury, *supra* note 110; *McMullin v. ICI Australia Operations Pty Ltd.* (1998), 156 A.L.R. 257 at 260, Wilcox J.: “In enacting Pt IVA of the Federal Court of Australia Act, Parliament was introducing into Australian law an entirely novel procedure.” However, Ryan J. of the Federal Court has expressed the view that “in many ways [PART IVA] involves a less radical reform than that recommended” by the ALRC: Ryan, *supra* note 110 at 135. See also *Mobil Oil*, *supra* note 76 at 164, Gleeson C.J.

¹⁶¹ *Mobil Oil*, *supra* note 76 at 175, Gaudron, Gummow & Hayne JJ. and at 205, Callinan J.

¹⁶² See R. York, “All Together Now: Standard Term Contracts and Representative Actions” (1996) 10 J. Contr. L. 85 at 88; Vince Morabito, “Taxpayers and Class Actions” (1997) 20 U.N.S.W.L.J. 372 at 403-04; NSW Law Foundation, *supra* note 95 at para. 4.3.5; and David Kell, “Renewed Life for the Representative Action” (1995) 13 Austl. Bar Rev. 95 at 97-98.

The inherent subjectivity and ambiguity of the concept of “inappropriateness,” upon which the power contained in paragraph (d) depends, represents a significant threat to the attainment of the access to justice objective of PART IVA. To avoid this undesirable scenario, the power to terminate properly commenced PART IVA proceedings must be interpreted and applied by reference to the objects of PART IVA.¹⁶³ This means that where the class members would be unable to seek legal redress on their own, the discontinuance of a properly instituted class proceeding is not justified.¹⁶⁴ An illustration of this desirable approach is furnished by *Huang v. Minister for Immigration and Multicultural Affairs*¹⁶⁵ where Justice Lehane rejected the defendant’s application to have this PART IVA proceeding terminated pursuant to section 33N. This ruling was based on the fact that the class members would have been time-barred from commencing individual proceedings. The relevance, to the exercise of the section 33N power, of the inability of the class members in question to initiate individual proceedings, should not be limited to circumstances where this inability is attributable to legal obstacles such as the operation of statutory limitation periods. It should also extend to circumstances where an inability to pursue legal remedies, through traditional proceedings, is attributable to financial¹⁶⁶ and non-financial barriers.¹⁶⁷

¹⁶³ See Ryan, *supra* note 110 at 142. Canadian courts are frequently guided by the policy goals of class actions when interpreting class action legislation: Garry D. Watson, “Class Actions: The Canadian Experience” (2001) 11 Duke J. Comp. & Int’l L. 269 at 271. This is particularly evident in the application of the preferable procedure certification requirement: ALRI Report, *supra* note 2 at 69-70. This judicial approach was recently endorsed by the Supreme Court of Canada in *Hollick*, *supra* note 69 at 34, McLachlin C.J.C.

¹⁶⁴ See Lipp, *supra* note 39 at 376-77; OLRC Report, *supra* note 5 at 345; *Halvorson*, *supra* note 138 at 27-28, Donald, Huddart and Mackenzie J.J.A.; *Dalhuisen*, *supra* note 138 at para. 21, Burnyeat J.; *Endean v. Canadian Red Cross Society* (1997), 36 B.C.L.R. (3d) 350 at para. 63, Smith J.; and *Harrington v. Dow Corning Corp.* (1996), 22 B.C.L.R. (3d) 97 at 113, Mackenzie J.

¹⁶⁵ *Huang*, *supra* note 79 at 139, Lehane J.

¹⁶⁶ As noted by Lindgren J., “the policy of PART IVA is that respondents should not benefit from the fact that individual claims are relatively small and that many group members might not consider it worth their while to litigate them on their own initiative”: *Ryan v. Great Lakes Council* (1998), 155 A.L.R.447 at 456; and *Giraffe World*, *supra* note 66 at 293. See also *Williams v. FAI Home Security Pty Ltd. (No 4)*, [2000] F.C.A. 1925 at para. 39, Goldberg J.; *Graham Barclay Oysters Pty Ltd. v. Ryan (No 2)*, [2000] F.C.A. 1220 at para. 6, Lee, Lindgren & Kiefel JJ.; *Patrick v. Capital Finance Corporation (Australasia) Pty Ltd.*, [2001] F.C.A. 1073 at para. 11, Heerey J.; OLRC Report, *supra* note 5 at 345; and *Conte & Newberg*, *supra* note 96 at 247.

¹⁶⁷ See *1176560 Ontario Ltd. v. The Great Atlantic & Pacific Co of Canada Ltd.*, 2002 Ont Sup CJ LEXIS 2263 at 34, Winkler J.; ALRI Report, *supra* note 2 at 47-48; MLRC Report, *supra* note 5 at 1-2; Note, “Developments in the Law—The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives” (1999-00) 113 Harv. L. Rev. 1752 at 1809; and *Esso*, *supra* note 126 at para. 41, Gillard J.

Unfortunately, PART IVA proceedings have been terminated by trial judges with little or no consideration being given to whether this decision would have the practical effect of preventing access to the court for some or most of the class members. A striking illustration of this unsatisfactory judicial stance is provided by *Murphy v. Overton Investments Pty Ltd.*¹⁶⁸ The class representative in this PART IVA proceeding sought to persuade the court not to accede to the defendant's request for a section 33N order by drawing attention to the fact that most of the class members were residents of a retirement village. Accordingly, it was reasonable to presume that most, or at least some, of them might not be able to assume the burdens associated with being a named plaintiff in a court proceeding. Justice Emmett dismissed this proposition in the following manner:

That is not a weighty consideration to be taken into account in determining the inappropriateness or otherwise of the claims being pursued by means of representative proceedings. Procedures are available, for example, whereby guardians *ad litem* can be appointed for incapacitated or disabled parties.¹⁶⁹

A different and preferable approach was followed by the Supreme Court of Canada in *Rumley v. British Columbia*.¹⁷⁰ The Court upheld a certification order, partly on the basis of the following considerations:

[I]t is necessary to emphasise the particular vulnerability of the plaintiffs in this case. The individual class members are deaf or blind or both. Litigation is always a difficult process but I am convinced that it will be extraordinarily so for the class members here. Allowing the suit to proceed as a class action may go some way toward mitigating the difficulties that will be faced by the class members.¹⁷¹

A similar approach was embraced by the Full Federal Court in *Bright*. Justice Finkelstein, for instance, drew attention to the fact that section 33N itself provides that the power it confers upon the court may only be activated "if it is in the interests of justice."¹⁷² He added that

¹⁶⁸ *Murphy*, *supra* note 111.

¹⁶⁹ *Ibid.* at para. 120. It is therefore strange that in 1996, Peter Gordon, who has acted for representative plaintiffs in numerous PART IVA proceedings, proposed a certification regime pursuant to which aspiring class representatives would need to satisfy the Court that, among other things, "there is no other reason why a class action is inappropriate": P. Gordon, "Class Actions: The Victorian Direction—The Plaintiff's Perspective" (Paper presented at a Seminar on Class Actions, Melbourne, June 1996) at 5.

¹⁷⁰ (2001), 205 D.L.R. (4th) 39.

¹⁷¹ *Ibid.* at 57, McLachlin C.J.C.

¹⁷² *Bright*, *supra* note 40 at 605; see also *Bright*, *supra* note 40 at 588-89, Lindgren J., and 601, Kiefel J.; and *Esso*, *supra* note 126 at para. 41, Gillard J. ("the guiding principle of Part 4A, is justice").

“whether or not it is in the interests of justice to make [a section 33N] order has to be weighed against the public interest in the administration of justice that favours class actions. That requires one to consider the principal objects of the class action procedure.”¹⁷³ The application of this general principle to the proceedings in *Bright* produced the following result:

It seems to me that if these women are not permitted to bring a group claim, it is likely that many of them will not pursue an individual claim because the potential gain would not justify incurring the risk of costs. In that sense it would be contrary to the interests of justice to make an order under s. 33N.¹⁷⁴

V. CONCLUSION

What lessons may be learned from the way in which the certification-free class action regime in the Federal Court of Australia has operated over the last twelve years or so? One important lesson is that it would be naive to act on the premise that the non-employment of a certification mechanism will ensure that little or no time will be spent by the court on assessing whether it is appropriate for a given proceeding to be conducted as a class proceeding. It has also been shown that the lack of a certification regime does not necessarily mean that representative plaintiffs are never required to justify, to the Court, their selection of the class action device as the most appropriate means of dealing with the legal grievances of the relevant class of plaintiffs. But the existence of very broad powers to terminate properly commenced class actions makes it difficult to rely on the problems that have been highlighted in this article as clear and unambiguous evidence that the certification procedure should be regarded as an indispensable feature of any modern class action regime.

The experience with PART IVA is also instructive to the extent that it shows that requiring class representatives to overcome two potential obstacles before they may be able to conduct a class proceeding produces outcomes that are incompatible with the “access to justice” and “judicial economy” objectives of class action devices. The two requirements in question are, of course, the ability to satisfy the court, in the event of a challenge by the defendants, that the litigation in question adheres to the requirements for the commencement of class actions, and that the scenarios that permit the court to discontinue properly commenced class actions are not applicable. Therefore, the claim by some commentators that PART IVA is significantly more pro-plaintiff than class action regimes that employ a

¹⁷³ *Bright*, *supra* note 40 at 605. See also, *Bright*, *supra* note 40 at 576, Lindgren J.

¹⁷⁴ *Ibid.* at 607.

certification procedure¹⁷⁵ is erroneous.

This study of the Australian federal regime demonstrates that the commencement criteria constitute the most appropriate mechanism for determining which proceedings should be conducted as class proceedings. Consequently, the drafters of the regimes that currently govern class actions in the United States and Canada may be said to have adopted the correct approach by providing that, once proceedings are certified as class actions, they may only be terminated following a re-assessment of whether there has been compliance with the certification criteria. The operation of the PART IVA regime has also highlighted the validity of the ALRC's recommendation that the commencement prerequisites should play a central role in ensuring that group litigation enhances access to justice for classes of persons with similar legal grievances, while at the same time operating in a fair and efficient manner.

Another principle that emerges is that the availability of the class action device should not be made dependent on vague and subjective concepts such as efficiency and effectiveness or on the court's unfettered discretion as to whether it is appropriate for a proceeding to be conducted as a class proceeding. It has also been shown that the availability of the class action device is significantly restricted when the court's assessment of which proceedings should be conducted as class actions is not guided by, or undertaken by reference to, the benefits that the class action device is expected to secure.

The analysis of PART IVA also highlights the fact that neither the lack of a certification regime nor the desirable goals of protecting the processes of the court and the interests of class members and defendants justifies the creation of broad termination powers. A final principle that emerges from this study of PART IVA is that, whether or not a certification procedure is utilized, the same strategy should be adopted to ensure that the class action device fulfills its objectives and operates in a fair and efficient manner. This strategy, which was largely adhered to by the ALRC, seeks the attainment of the desirable scenario depicted in the preceding sentence through the selection of appropriate threshold criteria, the implementation of various safeguards and the conferral on the court of wide powers to manage the proceedings.

It is highly likely, indeed certain, that the current Australian government would not even consider amendments to PART IVA, including the repeal of provisions such as subsections 33M and 33N, that are likely to result in an increase in the number of proceedings that may be brought

¹⁷⁵ Clark & Harris, *supra* note 37 at 296-97; and LRCI Report, *supra* note 2 at 75-76.

pursuant to PART IVA. Two recent developments substantiate this conclusion. Firstly, the Australian government has failed to implement the ALRC's recommendation that a review be commissioned on the operation of PART IVA.¹⁷⁶ Second, it recently legislated to prohibit the use of the PART IVA regime in migration litigation.¹⁷⁷ In light of this sad reality, the attainment of the access to justice and judicial economy goals of PART IVA mandates an extremely narrow construction of the provisions regulating the judicial discontinuance of properly instituted class actions. The recent decision of the Full Federal Court in *Bright* constitutes a step in this direction.

¹⁷⁶ Australian Law Reform Commission, *Managing Justice—A Review of the Federal Civil Justice System* (Report no. 89; 2000), recommendation 81.

¹⁷⁷ See S. Harris, "Another Salvo Across the Bow: Migration Legislation Amendment Bill (No 2) 2000 (Cth.);" (2000) 23 U.N.S.W.L.J. 208.

